US Army Corps
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Memphis District
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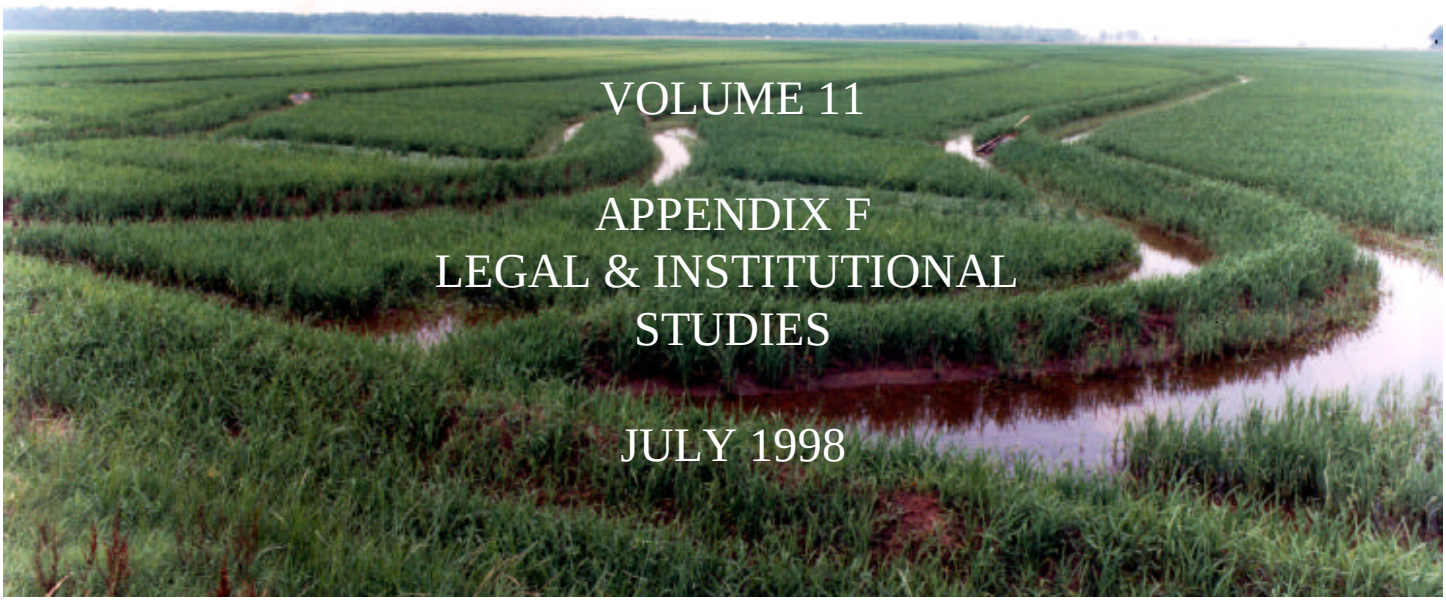
EASTERN ARKANSAS REGION COMPREHENSIVE STUDY

GRAND PRAIRIE REGION AND BAYOU METO BASIN, ARKANSAS PROJECT

GRAND PRAIRIE AREA DEMONSTRATION PROJECT

GENERAL REEVALUATION REPORT



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APPENDIX F
LEGAL & INSTITUTIONAL STUDIES

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GRAND PRAIRIE AREA

DEMONSTRATION PROJECT

Institutional and Legal Aspects

of

Project Development and Implementation

Summary and Recommendations

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Institutional and Legal Aspects of Project Development and Implementation: Summary and Recommendations

SUMMARY

The purpose of the report is to review the current status of Arkansas Law with regard to the institutional and legal framework relating to the utilization of water resources in the state. In particular, the focus is on those statutory, regulatory and judicial approaches that either promote or hinder the full development of both surface and groundwater. Naturally, this also requires attention to state efforts and policy directed toward conserving, preserving and protecting this valuable resource.

The full report contains considerable background information on the development and current state of water law in Arkansas. The full report includes a detailed analysis with appropriate legal citations of each question posed in the "Scope of Work." This summary does not include detailed information but, rather, summarizes the answers developed to the specific questions posed in the "Scope of Work." Where appropriate, this summary poses additional specific questions that must be addressed in order to carry out the proposal of the White River Regional Irrigation Water Distribution District to develop a system for the transfer and utilization of water from the White River.

Question 1. The success of the Grand Prairie Demonstration Project will hinge on the state or some other entity's authority to regulate and/or restrict groundwater withdrawals. Is this provided in existing law? Does an alternative source of water have to exist?

The 1991 Arkansas Groundwater Protection and Management Act suggests that limitation of groundwater withdrawals "through the use of water rights" may become necessary in critical groundwater areas. To implement a regulatory program the Arkansas Soil and Water Conservation Commission (ASWCC) must first designate critical areas following specific procedures. Once an area is so designated, before a regulatory program may be implemented the ASWCC must determine that the initiation of regulatory authority within a critical area is necessary, again following specified procedures.

The initiation of a regulatory program through the use of water rights would be accomplished primarily through limitations imposed on the issuance of <u>new</u> water rights since the legislation preserves the rights of existing users and gives special protection to those implemented within the first year after initiation of the

regulatory program.

The ASWCC has broad authority to promulgate rules and regulations "for groundwater classification and aquifer use, well spacing, issuance of groundwater rights within the critical groundwater areas, and assessment of fees." It appears that the authority of ASWCC to protect groundwater is not limited to the water rights program per se; however, the exact nature of the anticipated regulatory programs is not detailed in the legislation.

And, the legislation restricts ASWCC authority to reduce or limit withdrawal of groundwater from existing wells unless alternative surface supplies are available or can be made available at a cost no greater than the operating cost of the person's wells. Further, no reduction or limitation in the withdrawal of groundwater may be required if the user has implemented a water conservation plan employing generally accepted water conservation practice approved by ASWCC or has reduced use of groundwater by 20% by either institution of water conservation measures or by conversion to surface supplies.

Question 2. What is the state's present authority relative to nonriparian water use, allocation limits, minimum in-stream flow requirements, and diversion of White River Water?

The 1985 legislation (Act 1051) allows transfer of surface water to nonriparian land under specified conditions. Approval for such transfers in granted by the ASWCC only after a determination that the water to be used is "excess" surface water, that it is to be used for a reasonable and beneficial use, and that the transfer "will cause no significant adverse environmental impact." These determinations are made upon an application for a permit for either an interbasin or intrabasin transfer. When the transfer is interbasin the ASWCC must also take into account the protection of the watershed of the basin of origin and to insure against an adverse impact of the transfer on other lawful water uses. [The determination of "excess surface water" is discussed in Question 3 below]

The ASWCC has had the authority since 1957 to allocate available stream water during periods of shortage. This legislation, amended in 1989, and the rules developed by the ASWCC, establish a system of priorities among uses and indicates that some uses may be continued without allocation and others are to be reserved prior to allocation.

The allocation system can best be illustrated, schematically, as follows.

uses under 325,900 gallons per water year
diffused surface water
water previously captured
water in exclusion ownership
water from tail water recovery
non-consumptive use
diversion from intermittent streams
water captured under permit
} usable without allocation

domestic and municipal-domestic
minimum streamflow
  interstate compacts
  navigation
  fish and wildlife
  water quality
  aquifer recharge
} reserved uses prior to allocation
federal water rights

riparian (registered)
  agriculture
  industry
  hydropower
  recreation

riparian (non-registered, but previously used) ?

non-riparian intrabasin
  agriculture
  industry
  hydropower
  recreation

non-riparian interbasin transfer
  agriculture
  industry
  hydropower
  recreation

interstate
  agriculture
  industry
  hydropower
  recreation

riparian (non-registered, not previously used)

Among the specific authority granted the ASWCC is that of establishing and enforcing minimum stream flows for the protection of instream water needs. These instream needs, to be determined on a case-by-case basis, are (1) aquifer recharge, (2) fish and wildlife, (3) interstate compacts, (4) navigation and (5) water quality. Usual rule making procedures must be followed in making this determination.

Question 3. Existing legislation has defined excess flow on an annual basis. Is there any legislation that defines excess flow for nonriparian use? Does excess flow for nonriparian use always exist when the flow is above the minimum flow set by the state?

In authorizing the ASWCC to permit transportation of excess surface water to nonriparian land the legislation defined "excess surface water" as twenty-five percent of that amount of water available on an average annual basis from any watershed above the amount necessary to satisfy: (1) existing riparian rights as of the effective date of the Act; (2) water needs of federal water projects existing on the effective date of the Act; (3) the firm yield of all reservoirs in existence on the effective date of the Act; (4) maintenance of in-stream flows for fish and wildlife, water quality, and aquifer recharge requirements; and (5) future water needs of the basin of origin as projected in the State Water Plan. Navigation and interstate compact needs would also have to be taken into account because the ASWCC must consider these in establishing minimum stream flows.

Question 4. When stages on the White River reach a determined level (minimum flow requirements) will agricultural irrigation, navigation, fish and wildlife, and water quality interests compete on an equal basis and share the pain?

Since transfers of surface water may only be authorized to the extent of 25% of the "excess" above that determined as necessary for various instream flow needs, it is clear that the legislature did not contemplate transfers to nonriparian uses (or riparian uses for that matter) until minimum instream flow requirements are met. The allocation rules recognize this limitation in designating these uses as "reserved prior to allocation." Thus, irrigation uses on riparian or nonriparian land would be of lower priority in an allocation proceeding. (Nonriparian intrabasin use has a higher preference than nonriparian interbasin use.) [These priorities are outlined in the Chart in Question 3]

One interesting note bears emphasis. Included in those uses which may be used without allocation is water stored in federal impoundments or water captured by instream pit reservoirs and "low water weirs" or in dams constructed pursuant to a lawful permit. The exclusion of water in federal impoundments is consistent with

1957 legislation which grants a right to acquire "absolute title to and use for any purpose" of such water. The exclusion of water in instream pit reservoirs, low water weirs or in dams constructed under permit must be read in light of the dam permit legislation which allows such construction only if it does not affect downstream riparians or instream flow requirements.

The apparent intent of the ASWCC is to establish a system of water level monitoring which will aid in coordinating the allocation of water during shortages. Within particular uses the allocation will be made on a "first in time, first in right" basis.

Question 5. What is the financial and legal capacity of the White River Regional Irrigation Water Distribution District?

a) Existing

b) Required to sponsor project: WRRIWDD proposes to finance the project and its operation and maintenance through the sale of water or the levying of a tax for assessed benefits.

c) What procedures are required for WRRIWDD to take and sell water from the White River?

The WRRIWDD was established pursuant to Act 114 of 1957, the "Regional Water Distribution District Act." It was anticipated that such districts would be organized and created to contract with the United States to make use of water supply from multipurpose reservoirs constructed by the Corps of Engineers. These districts were empowered to acquire title to water in such reservoirs or other water sources created by the construction of multipurpose dams and to "transport, distribute, sell, furnish, and dispose" of this water to any person at any place.

The "powers" section of the Act was amended in 1989 and gives the District broad powers to carry out its functions including the right to regulate, define and control the rate and location of any withdrawal or transfer of water, in natural or man-made channels, which is "owned, acquired, or developed by the district."

In addition, in connection with the acquisition, construction, improvement, operation, or maintenance of its transportation and distribution facilities, the district is authorized to use the bed of any stream, "without adversely affecting existing riparian rights." This right also extends to public property such as highways, rights-of-way or easements and tax-forfeited land.

Since the primary purpose is water distribution, it was anticipated that the districts would generate revenues from "rates, fees, rents or other charges" for water and services of the district. These districts, unlike those authorized by the "Arkansas Irrigation, Drainage and Watershed Improvement District Act of 1949" Act 329 of 1949, were given no authority to levy assessments on the basis of benefits derived by lands within the

district nor to levy taxes on the amount of the assessment of benefits thereon. The only authorized source of revenue appears to be from the sale and distribution of water.

As outlined in Questions 2 and 3, the ASWCC may authorize the intrabasin transfer of excess surface water to nonriparians through a permit procedure. This procedure includes authorization to "persons" divert such water but "person" includes "any federal, state or local governmental agency." The permit application process requires detailed information on the proposed transfer including the quantity of water, times of diversion, purpose, location of land, types of crops and a proposed conservation plan if for irrigation.

It must be noted that this permit procedure refers to the use of water, not the acquisition of title to the water itself. Neither the legislation nor the ASWCC rules contemplate that a permittee is to become the owner of the water. However, given the broad authority outlined in the district's "powers" section, it would appear that the district would have to comply with the permit procedure to obtain the right to transfer the water but that the authority of the district to acquire absolute title from federally financed projects would take precedence. Certainly, the district would be able to impose rates and charges for the distribution of the water to lands described in the transfer permit.

Question 6. Can the WRRIWDD obtain the authority to regulate groundwater use within the project boundaries?

The groundwater legislation indicates that "every effort" should be made by ASWCC to delegate water management powers to qualified local districts which includes either conservation districts or regional water districts if a regulatory program is implemented. The ASWCC may delegate any of its powers to a district within a critical groundwater area and is to provide technical assistance and establish guidelines which "shall be followed" by districts delegated such authority. However, the nature of the regulatory program and the types of controls available is not detailed in the statute.

Question 7. Can the WRRIWDD obtain the authority to regulate flow levels and pool levels in natural streams? Would the WRRIWDD need to obtain flowage easements?

The 1985 legislation specifically required the ASWCC to establish minimum stream flows. In 1989 additional statutory references to this authority was enacted by requiring the Commission to "establish and enforce minimum stream flows for the protection of instream water needs." No statutory authority exists for the ASWCC to delegate the establishment and enforcement of

minimum stream flows. However, this authority must be read in light of the "powers" section of the Regional Water District Distribution Act which specifically gives Districts the authority to "regulate, define, and control" the rate and location of any withdrawal or transfer of water in both natural and manmade channels "owned, acquired, or developed by the district." And, districts may use the bed of any stream for their distribution and transportation purposes "without adversely affecting existing riparian rights."

Since the ASWCC may delegate its allocation authority to regional water districts, a district would have considerable authority to deal with flow levels and pool levels during times of shortage if the allocation authority were delegated.

Question 8. Can the WRRIWDD levy a groundwater preservation fee (tax) on all land within the project area?

As mentioned in Question 5 regional water distribution districts have no power to impose taxes or assessments. Interestingly, the 1991 groundwater legislation authorizes the ASWCC to promulgate rules and regulations for "groundwater classification and aquifer use, well spacings, issuance of groundwater rights within critical groundwater areas, and assessment of fees." The legislation requires the ASWCC to assess annual fees for withdrawal of groundwater (and surface water). Presumably, these are the "fees" referred to in the powers section. The ASWCC may delegate any and all powers to districts within critical groundwater areas. This could include the authority to assess the annual withdrawal fee, although "fees" referred to in the legislation were set at only $10.00 per well per year so it would not be a "preservation fee" as such.

Question 9. Does the WRRIWDD currently have the right of access to perform surveys, evaluations, and investigations within the project area?

Unlike the powers granted a district organized under the Arkansas Irrigation, Drainage and Watershed Improvement District Act of 1949," regional water districts apparently have no such right of access. However, the ASWCC has such powers under the groundwater act which are delegable to districts within critical groundwater areas for purposes of carrying out the groundwater act's purposes.

Question 10. Can the WRRIWDD obtain the authority to regulate withdrawal of surface water (existing and import) especially when there is a history of use? Who will own the water in the delivery system, specifically the diverted water and the water resulting

from runoff?

If the WRRIWDD obtains the right to transfer a permitted amount of water to nonriparian land, through the permit process the District would have the authority to administer this water in accordance with the permit terms, that is, to distribute it to the identified land in the amounts permitted. However, this water would not be owned (unless acquired from a federal impoundment) by the District but would be available for use. However, the District should be free to distribute the water and, thus, regulate the withdrawal (amount and rate) from the delivery system. The "powers" section of the regional water distribution district Act refers specifically to such authority. (See Question 7)

However, the existing water in streams, used as a part of the delivery system, would not be controlled by the District unless those withdrawals were covered by separate permits. Through the same permit application process the ASWCC could authorize the District to divert this water as well if it was found to be "excess surface water" in a particular watershed. This procedure recognizes the possibility that riparian rights (as of June 28, 1989) would have to be taken into account in the determination.

Furthermore, any exercise of regulatory control by a district under the authority of its own "powers" section is subject to the limitation that it must be done "without adversely affecting existing riparian rights."

Question 11. Can the WRRIWDD regulate both the amount and rate of withdrawal from the delivery system?

As to the District's authority to regulate withdrawals generally, the one statutory basis for such authority is through the Commission's allocation authority during shortages, which may be delegated to conservation districts and regional water districts. In addition, the powers granted districts refer to their right to "regulate, define, and control" withdrawal or transfer of water in both natural and manmade channels "owned, acquired or developed" by the district, again subject to the limitation that existing riparian rights may not be affected.

Question 12. If the WRRIWDD acquires the land adjacent to the new canals and existing streams to be utilized as part of the project, will there be any riparian rights?

Under the traditional riparian rights doctrine, any riparian rights adhering to land by virtue of location pass with the land upon a sale or transfer. Thus, any land acquired by WRRIWDD would carry riparian rights. These rights would, under the traditional view, allow use of water from the stream on the riparian land

itself. Any transfers to nonriparian use would be subject to the more recent authority of ASWCC to permit such uses and subject to the "order of preferences" during an allocation procedure if shortages occur.

As to canals, the riparian rights doctrine is inapplicable to artificial structures so no riparian rights would attach to land adjacent to new canals by virtue of location.

Question 13. If Farmer A decides not to participate in the project, can he a) withdraw water (without payment) from the new project canals running through his property; b) continue to withdraw from natural streams (without payment) that are a part of the project; c) if the answer to b) is yes, how much can he withdraw without payment?

An owner of land within the district boundaries may petition for exclusion for agricultural irrigation water purposes if it can be shown that the land is adequately supplied by irrigation water from surface sources or other sources existing at the time the District is created "or at any time thereafter," and will not in the future be benefited by the improvements of the district. Thus, a landowner could argue that historical use of groundwater or of surface water (presumably properly registered with ASWCC) is sufficient to allow exclusion. The riparian right to surface water (previously used and registered) is entitled to recognition during a surface water allocation proceeding and a historical use of groundwater (registered) is entitled to be "grandfathered" if a regulatory scheme is implemented.

In addition, under the legislation authorizing ASWCC to permit nonriparian transfers of excess surface water, the ASWCC may condition such permits on the requirement that water be made available to users "within the immediate vicinity" of the proposed route of transportation at a "reasonable cost" which is only the cost of transportation, not the water itself.

Question 14. The project will require a nonriparian permit to withdraw excess water from the White River. Will the transfer of water at various locations within the project to nonriparian users also require a permit?

The permit, when issued, will include the amount of water permitted, the authorized use, the point of approved diversion, the legal description of the land of intended use and approved of the conservation plan. And, the permit "runs with the land" and cannot be sold separate from the land described in the permit and "can only be assigned to a subsequent owner or lessee of the land."

While it appears that the rules contemplate permit

applications from organizations such as WRRIWDD, the rules do not precisely indicate how the water so permitted is to be administered. Presumably, if the quantity of water to be diverted, and the location of land on which it is to be used, is identified both in the application and in the permit itself, no additional permit would be necessary to transfer water within the identified area.

Question 15. The WRRIWDD plans to apply for a nonriparian permit to withdraw water from the White River in the near future. How long will the permit be considered valid if construction of the project is at least several years away?

The surface water rules of ASWCC address the question by specifying that a permit of period greater than three years may be canceled if the permit fails to take "reasonable steps" to obtain the ability to utilize the water permitted within two (2) years from the date of issuance of the permit. No indication is given as to what is intended by "reasonable steps" to utilize the water.

Question 16. Can low level dams and gated structures be constructed in natural streams that are to be utilized as part of the project?

In 1957 the legislature granted ASWCC the authority to issue permits for dam construction within streams. The permit requirements apply only if the dam impounds 50 acre feet or more of water and is of a height of 25 feet or more. The construction permit is not required if the dam height is at or below the high water mark on any stream. If the Commission determines that a dam otherwise exempt would pose a significant threat to life or property, a construction permit is required.

The importance of the requirement of a dam construction permit is that it can only be granted if specified conditions are met. First, it can only be constructed to impound "surplus surface waters" and operated in such a way as to discharge a quantity of water (as fixed by the Commission) necessary to preserve the flow below the dam to protect the rights of any lower riparian owner and fish and wildlife dependent on the flow. Further, the "lives and property" of persons downstream must be adequately protected so the dam must be constructed and maintained in such a way as to preserve the dam and reservoir for the permit period. Second, the dam must be constructed or operated in such a way as to impound water only on land owned or occupied by the permit applicant or on beds or streams owned by the state.

Since dams envisioned in the project area would not likely meet the height requirement for permits this procedure would likely come into play only if the dams meet the impoundment limit or, if

determined by ASWCC pose a significant threat to life or property. However, any holder of a riparian right would be entitled to object if harmed by the impoundment of the water and the obstruction of flow. And, if the dam was exempt from the permit requirements, the lower riparians could petition the ASWCC to exercise its authority to allocate available water among users affected by a shortage. However, if the lower riparian is affected, not by an actual shortage, but because of the obstruction and impoundment itself, presumably, an action in court for interference with the riparian right could be brought. However, the extent of Commission involvement in such conflicts is not entirely clear in light of the categories of water that are usable without allocation" under Commission rules. (See Question 2)

For example, if water is to be captured by "instream pit reservoirs" and "low water weirs," these types of water capture can be constructed without a permit for dam construction. Although the rules for allocation allow use of such water without allocation, these uses could be construed as an interference with other riparian owners' rights to receive an equitable share of the water in a given stream.

Question 17. Will farmers that do not participate in the project still be entitled to their riparian right?

The creation of a district would in no way affect the existing riparian rights of farmers who do not participate in the project. Their rights are specifically recognized in all the legislative efforts to revise Arkansas water law and, in particular, their rights are provided for in the allocation scheme (See Question 2) if the use is properly registered. While failure to register may not deprive them of the right, ASWCC does not have to make an allocation during shortage. And, such persons would be entitled to make their own applications for transfer of stream water to nonriparian land on the same basis as any other persons. (Also see Question 10)

Question 18. Does the WRRIWDD have the authority to float bonds for payment of the project? Can they do this although it may be several years from initiation of construction before benefits of the project are realized?

The WRRIWDD would be specifically authorized to issue tax exempt bonds (exempt from state, county and municipal taxes) to generate financing for the project. (It may also borrow money.) These bonds are to be negotiable coupon bonds which may mature at various times up to 40 years from the date of issuance.

Question 19. What action is required for WRRIWDD to become an

improvement district or a group of similar districts with special improvement authority?

Three approaches might be considered. One would be to seek amendment of the regional water distribution district act to incorporate the type of authority as now provided for improvement districts organized under the 1949 Act. Presumably, this additional authority would extend to previously organized districts (especially if the legislation so specifies). This type of amendment would seemingly be required because the Act specifies that no other law of the state applies to districts organized under the Act. Thus, the general provisions relating to improvement districts could not be made available. However, because the original formation of the district was under an act which provided no taxing authority, even this type of amendment would raise serious questions. A second approach would be to dissolve the existing district and re-form it under the 1949 improvement districts legislation. This would require a majority of landowners (as opposed to 100 petitioners) and would not likely be feasible.

A more logical approach would be to form or create a number of smaller sub-districts under the 1949 improvement district legislation and then contract with them for the transportation and distribution of water. Such cooperative arrangements are contemplated under the "Interlocal Cooperation Act" in which water districts are specifically mentioned.

Instead of attempting to change the district structure it might be more feasible to suggest legislation which would allow for a vote by property owners as to whether the district is to exercise assessment and taxing authority. The legislature could limit the voting right to landowners either on the basis of acreage or assessed value.

Question 20. There are a number of drainage and/or improvement districts located within the jurisdiction boundary of the WRRIWDD. What are the ramifications of this in regards to drainage and water supply?

The generally accepted view is that multiple districts may exist in a given area each serving the territory and purposes described at its formation. Even if the purposes overlap they may exist concurrently if each provides benefits to property owners. And, given the care with which the ASWCC evaluates petitions for the formation of water districts it is unlikely that overlapping functions will pose a realistic problem. As to the presence of other types of districts, they may exist concurrently so long as they provide benefits to landowners.

Water districts may act jointly and cooperatively to carry out projects. The Interlocal Cooperation Act does not specifically

mention improvement districts such as levee, irrigation or drainage districts so some modification of that Act, and the water distribution district Act, may be desirable to make it clear that cooperative agreements between water districts and the other types of districts are authorized.

Question 21. Could the WRRIWDD acquire a specific easement for the entire project and qualify as a riparian user from the White River? If so, what type of easement would be required?

Water distribution districts have broad powers of eminent domain allowing them to acquire not only rights-of-way but "other properties." This power could be used, if necessary, to eliminate potential challenges to the use of water by downstream riparians. However, the permitting procedure for nonriparian transfers should make this unnecessary unless the district wanted to assure itself of a right to continue nonriparian use even during a shortage. Otherwise, riparian landowners, at least those who have registered a use, would take priority during an allocation procedure. Since it is possible for landowners to be excluded from the district by showing they have adequate water available, riparian landowners within the district might choose to be excluded then compete with uses made by the district. Exercise of the eminent domain power or the use of easements (covenants not to sue) could eliminate those potential conflicts.

Question 22. Is the proposed project consistent with the "Rules for Water Development Project Compliance" as set forth in the Arkansas State Water Plan?

The objective of the compliance rules is to assure that any proposed project complies with and implements the goals of the Arkansas Water Plan and "adequately coordinates the use of water resources within the region in which the project is located, and within the state as a whole." ASWCC may approve an application only if it meets these criteria. It then becomes an amendment to the Arkansas Water Plan.

In this case, since one of the major goals of the Arkansas Water Plan is to promote the conversion of water use from critical groundwater resources to alternatives utilizing surface water where it is available, the project should be consistent with the Arkansas Water Plan. The Plan specifically recommends that excess water from the White River and the Arkansas River be provided for use in the Grand Prairie region.

Question 23. In your estimation, what additional specific legislation will be required to make the Grand Prairie Demonstration Project and other similar projects successful?

See "Recommendations" below.

Question 24. What are some typical water contracts that have been used by entities in the past to sell irrigation water to farmers?

Contact information on water districts throughout the country is being compiled by WRRIWDD. Once this information is available sample contracts may be compiled in a later Appendix.

Water districts have almost complete autonomy to enter into any type of agreements necessary to fulfil their purposes. The Arkansas statute clearly emphasizes this idea giving water distribution districts the power to: "make any and all contracts necessary or convenient for the exercise of the powers granted in this subchapter." In addition the district is empowered to "fix, regulate, and collect rates, fees, rents, or other charges for water" and for services furnished by the water district.

The only restrictions appear to be that the rates must be "just, reasonable, and nondiscriminatory" and if water is distributed to consumers outside the district boundary the charges must be calculated in such a way so that no part of the cost of distributing water outside the district is borne by members of the district.

RECOMMENDATIONS

The major impediments to successful project operation fall into two categories: (1) Those related to uncertainty in the general law regarding groundwater and surface water utilization; and (2) Those related to authority of special water distribution districts created under Act 114 of 1957. Some items may be addressed by change in ASWCC regulations rather than by legislation. These are summarized separately.

Revision in Rules

(1) In the legislation authorizing a permitting scheme for nonriparian use, reference is made to "nonriparians." In the rules a "person" may be authorized to divert and transfer excess surface water. "Person" is broadly defined and includes associations as well as governmental agencies. Water distribution districts were, no doubt, contemplated to qualify for transfer authority. However, the rules implementing the transfer authority are more narrowly written, seemingly with individual applicants in mind. For example, the legal description of lands to be irrigated must be included in the permit application.[1] and the irrigation permit "runs with the land."[2] If a water distribution district is to be the entity authorized to divert and transfer surface water, these requirements would be particularly cumbersome. The rules need classification to fit the situation of a water district as permit applicant.

(2) In providing for allocation during shortages the ASWCC rules indicate that a riparian landowner who has "not previously diverted water nor timely registered any previous diversion" is not to be granted an allocation during shortages (above that required for domestic use).[3] This is consistent with the original 1969 allocation legislation.[4] However, the rules add confusion by indicating that nonriparian uses may be granted allocations if the use does not interfere with specific enumerated uses.[5] One of the enumerated uses is the "unregistered riparian uses" referred to in § 307.9 of the Rules. This may have intended to refer only to domestic uses by such

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[1] Rules § 304.3.

[2] Rules § 304.13.

[3] Rules § 307.9.

[4] Ark. Code Ann. § 15-22-215(f).

[5] Rules § 307.10.

unregistered riparians but, on the other hand, it may be an effort to comply with the language in the allocation statute indicating that the power of the Commission to make allocations "among persons taking water from streams during periods of shortage."[6] However, that statute also indicates that a nonriparian use of water is not to "supersede, subordinate, or otherwise take priority or precedence over a riparian right to divert water from a stream lake or panel."[7] Thus, the actual priority position of a riparian user who has not registered a diversion but has previously used water, although not currently doing, so is not addressed in light of the seemingly inconsistent language of the statute itself. This needs to be clarified in the rules.

(3) Under the rules, a nonriparian permit may be canceled if the permittee fails to take "reasonable steps" to obtain the ability to utilize the water within two years from the date of issuance.[8] Since project construction might commence several years after the permit is issued, the rules should be expanded to indicate the types of activities qualify as "reasonable steps" toward utilization of the water.

(4) In the allocation procedures during periods of shortage the apparent intent is to make allocations within categories of uses (e.g., nonriparian intrabasin transfers) on a "first in time, first in right" basis. This is not detailed in the rules and some clarification would be helpful.

Water Utilization: Legislative Recommendations

The 1985 surface water legislation and the 1991 groundwater legislation greatly enhanced the administrative authority of the ASWCC to deal with the allocation and use of water resources. However, in some cases the legislation and the implementing rules create uncertainties in the current state of the law that, by legislative amendment, could be substantially eliminated. The major problems identified are summarized here.

(1) The limitation of authorization to transfer only 25% of "excess" surface water appears unduly restrictive, given all the uses that must be taken into account in determining whether "excess" surface water exists in a given basin -- particularly if the transfer is intrabasin rather than interbasin. Perhaps, the

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[6] Ark. Code Ann. § 15-22-205.

[7] Ark. Code Ann. § 15-22-215(f).

[8] Rules § 304.12.

legislation should authorize a greater transfer (say 75%) particularly if the transfer is intrabasin.

(2) To facilitate the conversion from groundwater to surface water sources, Act 1051 of 1985 gave the ASWCC the authority to authorize transportation of excess surface water to nonriparians. Much of the detail was left to implementing regulations. In those regulations at § 301.5 the ASWCC indicates that it may delegate its authority to a local district. While the ASWCC has specific authority to delegate power to allocate water during times of shortage under Ark. Code Ann. § 15-22-221, no similar delegation provision is included in the legislation related to nonriparian use otherwise. If the goal is to allow more local control, then broader delegation authority is necessary.

(3) The registration legislation requires those who divert surface water to register that diversion with the ASWCC or his "local conservation district."[9] Similarly, withdrawals of groundwater must be reported to the ASWCC or the local conservation district.[10] If allocation authority for surface water or operation of groundwater regulatory programs are to be delegated to water distribution districts, it seems logical that registration and reporting should be to such districts as well. The question of who is to receive the appropriate fees in such cases should likewise be addressed.

(4) The groundwater legislation contemplates the possibility of future regulatory programs in critical areas. A complicated scheme exists for protection of existing uses and uses to be implemented within one year of initiation of a regulatory program. Just what may be included in such a regulatory program, if implemented, is not set out in detail in either the statute or the Rules. Limitations on annual withdrawals, duration of rights, cancellation of rights, well spacing and groundwater classification and use are all specifically mentioned. Perhaps, this is broad enough for a comprehensive regulatory program, if necessary, but it does not mention a number of techniques that might be essential to actual implementation of a regulatory program. For example, rotational pumping, seasonal withdrawals, required conservation measures, are not referenced. The kind of authority given Groundwater Management Districts in Kansas or Natural Resource Districts in Nebraska is needed.

(5) One of the greatest weaknesses in the 1991 groundwater legislation is the provision that if a groundwater regulatory program is implemented, new wells will be "grandfathered" (automatically granted "rights") if completed within one year of

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[9] Ark. Code Ann. § 15-22-215.

[10] Ark. Code Ann. § 15-22-302.

the implementation of the regulatory program. Furthermore, no restrictions or limitations may be posed on these wells for a period of four years. If the situation is serious enough for the designation of an area as a "critical groundwater area" and the implementation of a regulatory program, this "grandfathering" provision is counter-productive and will encourage the exact behavior the regulatory program will be designed to prevent. This aspect of the groundwater legislation should be eliminated.

District Authority: Legislative Recommendations

The Regional Water Distribution District Act[11] confers much more limited authority on districts organized under that legislation than that given to districts organized under the Arkansas Irrigation, Drainage and Watershed Improvement District Act[12] This is, in part, because of the difference in organization requirements (100 owners vs. majority). It is a rock bottom principle that special districts only have such power and authority as specified in the legislation (or which can be implied from it) authorizing their creation.

(1) The Regional Water Distribution District Act gives broad authority to the district to acquire water, water storage and withdrawal rights and to enter contracts to carry out the powers of the district.[13] By contrast the 1949 Act has a detailed section related to contracts between districts and the United States.[14]

(2) The 1949 Act gives districts authority to accept appropriations from the state:[15]

> The board may also accept appropriations from the state upon such terms and conditions as may be imposed by law or regulation to be used in the furtherance of the purposes for which the district was authorized.

No similar authority exists for regional water distribution districts.

(3) The 1949 Act empowers the district Board to enter land

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[11] Act 114 of 1957.

[12] Act 329 of 1949.

[13] Ark. Code Ann. § 14-116-402(3)(A) and (B), (12).

[14] Ark. Code Ann. § 14-117-402.

[15] Ark. Code Ann. § 14-117-304(c).

within the district to make surveys and for other purposes:[16]

> The board, its agents, and its employees shall have the right to enter upon any land within the district to make surveys and for other purposes.

No similar authority exists for regional water distribution districts.

(4) The Regional Water Distribution Act contains a specific method by which land may be excluded from the district.[17] A related provision appears in the 1949 Act but it also provides a method by which additional land may be <u>included</u> in the district.[18] No similar provision exists for the regional water distribution district once established. The only method is by petition of landowners themselves. The 1949 Act provision appears to be more complete.

(5) Neither the Regional Water Distribution Act nor the Interlocal Cooperation Act specifically authorize water distribution districts to enter into agreements with drainage districts, irrigation districts or other districts organized under separate legislation. This authority should be explicitly stated in both acts.

(6) The district's authority to deal with water developed by the district but being transported in natural streams should be clarified. The district powers suggests that such water is to be controlled and regulated by the district but existing riparian uses would apparently have to be recognized. If the district is to control this water, the power to regulate withdrawals is probably sufficient but is should be expressly stated in the legislation that the placing of such developed water in natural streams in no way makes it available to existing riparian users not receiving water from the system and paying its rates and charges.

(7) If the power to regulate groundwater is to be delegated to a water distribution district, as provided in the groundwater legislation, not only should the types of regulatory authority be more clearly spelled out as suggested above, but the district may wish to have the authority to impose user charges for groundwater as now provided in the Kansas groundwater legislation.

(8) The 1949 Act allows drainage and irrigation districts

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[16] Ark. Code Ann. § 14-117-304(b).

[17] Ark. Code Ann. § 14-116-207.

[18] Ark. Code Ann. § 14-117-208 and 14-117-209.

considerable assessment authority[19] as well as taxing authority.[20] No similar authority exists for districts organized as regional water distribution districts. They are apparently limited to the generation of revenues from "rates, fees, rent, or other charges for water and other facilities, supplies, equipment, or services furnished by the water district."[21] This limitation may pose the most serious obstacle to future operation of a district. Legislation to simply add such authority would be questionable. However, one approach might be to amend the legislation to allow for a future vote by property owners included within the district to adopt assessment and taxing authority. Again, because such districts have only that authority granted by the legislation, this change would seem appropriate.

An Alternative Proposal

It is clear from an examination of the existing water resource legislation that the legislature wished to involve local entities to the greatest extent possible in decisions involving management of water, both surface and groundwater. Not only may ASWCC delegate allocation authority to such districts, but the entire groundwater regulatory program, if implemented, may be delegated in a similar fashion. And, the ASWCC Rules contemplate delegation of certain surface water management decisions. This delegation may be to either "water districts," meaning water distribution districts, or "local conservation districts."

In those situations where ASWCC finds that an area should be designated as a "critical groundwater area" it will become desirable to implement groundwater control measures and also to encourage conversion to surface water sources. It would seem logical to allow water distribution districts greater flexibility in dealing with management of all water in such local areas. One approach would be to provide for the designation of a local water districts as a "water management district" with the type of authority available to the Kansas Groundwater Management District and the Nebraska Natural Resources District. The local district would continue its development programs and projects but would also assume all water management responsibility subject, of course, to oversight by the ASWCC. (It is likely that in some areas water distribution districts might not exist, so a similar designation could be made of a local conservation district.)

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[19] Ark. Code Ann. § 14-117-403 et seq. and 14-117-209.

[20] Ark. Code Ann. § 14-117-413 et seq. and 14-117-420.

[21] Ark. Code Ann. § 14-116-404 and 14-116-402(13).

Attached to the Report as Appendices C and D are the complete statutes relating to the Kansas and Nebraska programs.

Eastern Arkansas Region Comprehensive Study
Grand Prairie Area
Demonstration Project

APPENDIX F - LEGAL & INSTITUTIONAL STUDIES

SECTION II

Institutional and Legal Aspects of Project Development and Implementation.;
Looney, J.W., November 1994.

GRAND PRAIRIE AREA

DEMONSTRATION PROJECT

Institutional and Legal Aspects

of

Project Development and Implementation

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November, 1994

Research Report Prepared in Accordance With
Contract No. DACW66-94-M-1393 U. S. Army Corps of Engineers,
Memphis District

Institutional and Legal Aspects of Project Development and Implementation: Grand Prairie Area Demonstration Project

The purpose of this report is to review the current status of Arkansas law with regard to the institutional and legal framework relating to the utilization of water resources in the state. In particular, the focus is on those statutory, regulatory and judicial approaches that either promote or hinder the full development of both surface and groundwater. Naturally, this also requires attention to state efforts and policies directed toward conserving, preserving and protecting this valuable resource.

A number of specific questions were posed in the "Scope of Work" in light of the proposal of the White River Regional Irrigation Water Distribution District to develop a system for the transfer and utilization of water from the White River to the Grand Prairie area. These specific questions are:

Question 1. The success of the Grand Prairie Demonstration Project will hinge on the state or some other entity's authority to regulate and/or restrict groundwater withdrawals. Is this provided in existing law? Does an alternative source of water have to exist?

Question 2. What is the state's present authority relative to nonriparian water use, allocation limits, minimum instream flow requirements, and diversion of White River Water?

Question 3. Existing legislation has defined excess flow on an annual basis. Is there any legislation that defines excess flow for nonriparian use? Does excess flow for nonriparian use always exist when the flow is above the minimum flow set by the state?

Question 4. When stages on the White River reach a determined level (minimum flow requirements) will agricultural irrigation, navigation, fish and wildlife, and water quality interests compete on an equal basis and share the pain?

Question 5. What is the financial and legal capacity of the White River Regional Irrigation Water Distribution District?

a) Existing

b) Required to sponsor project: WRRIWDD proposes to finance the project and its operation and maintenance through the sale of water or the levying of a tax for assessed benefits.

c) What procedures are required for WRRIWDD to take and sell water from the White River?

Question 6. Can the WRRIWDD obtain the authority to regulate groundwater use within the project boundaries?

Question 7. Can the WRRIWDD obtain the authority to regulate flow levels and pool levels in natural streams? Would the WRRIWDD need to obtain flowage easements?

Question 8. Can the WRRIWDD levy a groundwater preservation fee (tax) on all land within the project area?

Question 9. Does the WRRIWDD currently have the right of access to perform surveys, evaluations, and investigations within the project area?

Question 10. Can the WRRIWDD obtain the authority to regulate withdrawal of surface water (existing and import) especially when there is a history of use? Who will own the water in the delivery system, specifically the diverted water and the water resulting from runoff?

Question 11. Can the WRRIWDD regulate both the amount and rate of withdrawal from the delivery system?

Question 12. If the WRRIWDD acquires the land adjacent to the new canals and existing streams to be utilized as part of the project, will there be any riparian rights?

Question 13. If Farmer A decides not to participate in the project, can he a) withdraw water (without payment) from the new project canals running through his property; b) continue to withdraw from natural streams (without payment) that are a part of the project; c) if the answer to b) is yes, how much can he withdraw without payment?

Question 14. The project will require a nonriparian permit to withdraw excess water from the White River. Will the transfer of water at various locations within the project to nonriparian users also require a permit?

Question 15. The WRRIWDD plans to apply for a nonriparian permit to withdraw water from the White River in the near future.

How long will the permit be considered valid if construction of the project is at least several years away?

Question 16. Can low level dams and gated structures be constructed in natural streams that are to be utilized as part of the project?

Question 17. Will farmers that do not participate in the project still be entitled to their riparian right?

Question 18. Does the WRRIWDD have the authority to float bonds for payment of the project? Can they do this although it may be several years from initiation of construction before benefits of the project are realized?

Question 19. What action is required for WRRIWDD to become an improvement district or a group of similar districts with special improvement authority?

Question 20. There are a number of drainage and/or improvement districts located within the jurisdiction boundary of the WRRIWDD. What are the ramifications of this in regards to drainage and water supply?

Question 21. Could the WRRIWDD acquire a specific easement for the entire project and qualify as a riparian user from the White River? If so, what type of easement would be required?

Question 22. Is the proposed project consistent with the "Rules for Water Development Project Compliance" as set forth in the Arkansas State Water Plan?

Question 23. In your estimation, what additional specific legislation will be required to make the Grand Prairie Demonstration Project and other similar projects successful?

Question 24. What are some typical water contracts that have been used by entities in the past to sell irrigation water to farmers?

Some statutory and regulatory enactments, and a limited number of judicial decisions, exist which shed light on these questions. However, given the increased interest in water resource issues in Arkansas, the current state of the law is evolving. As a result, some specific questions cannot be precisely answered under current law. However, any effort to

address these questions and to analyze the current state of the law must be undertaken with a clear perspective of the historical developments which have led to the evolution of Arkansas law to date. Thus, the report commences with a brief review of legal developments in Arkansas related to water, particularly over the past 40 years.

I. HISTORICAL DEVELOPMENT OF WATER LAW IN ARKANSAS

For the most part, water allocation has been considered a function of state government although the federal government is involved in a range of activities affecting water allocation.[1] Each state has been free to choose, adopt, and change its own allocation system. Thus, the systems vary considerably from state to state but follow some general patterns.

A. Surface Water

The method of allocation of surface water recognized in the eastern states, and at first in some western states, is the "riparian rights system." Such rights are still recognized to

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[1] For example, direct federal water allocation on interstate streams was at issue in early cases before the United States Supreme Court. See Kansas v. Colorado, 185 U.S. 125 (1902), where the Court referred to the development of "interstate common law." A more persuasive form of federal involvement consists of control over navigable waters, first recognized when the Court held that the constitutional power of the federal government to control commerce encompassed navigation. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The power to control navigation was soon applied to navigable waters themselves. Gilman v. Philadelphia, 70 U.S. (2 Wall.) 713 (1865).

some extent in a few western states.[2] Basically, the riparian rights doctrine limits the right to use water from streams or lakes to those who are riparian landowners (who own land abutting the stream or lake) and limits the amount and purposes of water use to what is reasonable, giving due regard to the rights of other riparian owners.[3]

The riparian land limitation means that water can only be used on land in the same watershed[4] and that water can only be used on riparian land.[5] Nonriparian uses can be enjoined if harm or injury to riparian owners results.[6]

Under the "reasonable use" limitation, reasonableness is determined by comparing a given use with uses by other riparians.[7] Domestic uses are frequently given preference.[8] The

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[2] See Ausness, Water Use Permits in a Riparian State: Problems and Proposals, 66 Ky. L.J. 191 (1977).

[3] For a good review of the riparian rights concept see Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955).

[4] Ausness, supra note 2, at 203. See also Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924 (1954).

[5] Ausness, supra note 2, at 201. See also Levi & Schneeberger, The Chain and Unity of Title Theories for Delineating Riparian Land: Economic Analysis as an Alternative to Case Precedent 21 Buffalo, L. Rev. 439 (1972).

[6] Ausness, supra note 2, at 201; Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924 (1954).

[7] Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955). Ausness supra note 2, at 200, reviews factors which may be considered in the determination as including:

> rainfall, climate, season of the year, customs and usages, size, velocity and capacity of the watercourse, nature and extent of improvements on the watercourse, amount of water taken, place and method of diversion, place of use, previous uses, the object of the use, the extent and type of use, its

question of whether a particular use is reasonable can only be determined after the use has commenced. This problem leads to uncertainty as to how stable the right is because it is always subject to modification by implementation of new uses by other riparians.[9]

In the west, where water was scarce, the users wanted a more secure system -- one that established fixed, quantifiable rights to water. Thus, some states, even after adopting the riparian system, dropped it in favor of "prior appropriation;" others began with "prior appropriation." The "California doctrine" states recognized both systems -- or began with one and gradually changed -- but still recognize riparian rights to some extent. These states include Alaska, California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Washington, and Mississippi.[10] The "Colorado doctrine," or "pure appropriation" states, are the Rocky Mountain states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.[11]

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necessity and importance to society, and the uses, rights and reasonable needs of other riparians.

[8] Ausness, supra note 2, at 201 n. 64.

[9] Ausness, Water Rights Legislation in the East: A Program for Reform, 24 Wm. & Mary L. Rev. 547, 550 (1983).

[10] Ausness, supra note 2, at 194. Mississippi, the only eastern state to change to the prior appropriation system, did so in 1956 but has since made major changes in the system. See Champion, Prior Appropriation in Mississippi: A Statutory Analysis, 39 Miss. L.J. 1 (1967).

[11] Tarlock, Corbridge and Getches, Water Resources Management (4th Ed. 1993).

The prior appropriation system is essentially a "first in time-first in right" system with prior, exclusive rights usually established by an administrative procedure or by adjudication.[12] Under the appropriation doctrine, water must be physically removed from the watercourse and put to a beneficial use. However, the riparian land restriction of the riparian rights doctrine is not applicable. Once established, the right to a fixed quantity is permanent (it is not time-limited in most states). The priority may be established by several tests but frequently is dated to the time water was actually appropriated. Rights under most appropriation systems can be lost by failure to use the water beneficially, by waste, or by nonuse.[13]

B. Groundwater

The basic rights of landowners to use groundwater are based on one of four general legal theories: the absolute ownership doctrine, the American rule of reasonable use, the correlative rights doctrine, or prior appropriation.[14]

Under the absolute ownership doctrine, the landowner essentially has unrestricted use of groundwater. No liability is imposed for use of groundwater unless the owner acts maliciously or wastefully. Texas still follows some aspects of the absolute ownership doctrine, considerably modified, and it is apparently

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[12] Moses and Beaton, The Initiation of New Water Rights in the Western States, 1982-1983 Agric. L.J. 153.

[13] Id.

[14] Id. at 168-70.

still recognized in a few of the eastern states.[15] A modification of the absolute ownership concept is the American rule of reasonable use which is followed in a number of states.[16] This concept differs from the absolute ownership rule in that use is restricted to overlying land, and some limits are placed on the use of the extracted water.[17]

The third concept of groundwater allocation is the correlative rights doctrine. This concept, which is a modification of the American rule, gives each landowner with land over a common supply of water an equal and correlative right to make reasonable use of the water. Where this concept has been adopted, conflicts are resolved on the basis of pro rata sharing of the available supply among users. Rights of overlying landowners to the use of groundwater are correlative.[18] The correlative rights doctrine is similar to the reasonable use concept applicable to surface water in that the right to water use is usufructuary, and the use must be a reasonable share of the available supply.[19]

Some states that follow the prior appropriation doctrine for

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[15] 5A R. Powell and P. Rohan, The Law of Real Property ¶ 715(3) (1993).

[16] Id.

[17] Moses and Beaton supra note 12. See also Cox, Establishment and Maintenance of Water Rights in the Eastern United States, 1982-1983 Agric. L.J. 53.

[18] Ausness, supra note 2, at 212.

[19] Ausness, supra note 2, at 213-214.

surface water allocation also apply the appropriative concept to groundwater. The right to extract groundwater is not related to land ownership but is authorized following an administrative procedure.[20]

II. CURRENT WATER LAW IN ARKANSAS

As a riparian rights state, Arkansas has generally followed the basic concepts of the riparian rights system with regard to the allocation of surface water from rivers, lakes, and streams and has adopted the reasonable use concept for groundwater as well. A combination of litigated cases and legislative enactments comprises the body of water law for the state. Under the riparian rights doctrine, a water right arises as an incident of ownership of riparian land or land overlying a groundwater source of water. The question of what is encompassed by the riparian right can be best defined by considering the nature of the riparian right, the scope and extent of the right, and restrictions on the place of water use.

A. Nature of the Riparian Right

The Arkansas Supreme Court has had the opportunity to partially define the nature of the riparian right in several situations, but not all questions concerning the nature of the right have been before the court. In some cases the court has referred to the rights as vested property rights which "inhere in

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[20] Moses and Beaton, supra note 12, at 170. See also Hoberg, The Nature and Extent of Ground Water Management Problems: A Survey, 1982-1983 Agric. L.J. 404.

the owner of the soil."[21] However, the right has been limited by the generally accepted rule that a riparian owner cannot exercise his rights in derogation of the rights of another. In Thomas v. LaCotts[22] the court quoted from a speech given in Arkansas by a noted water expert, Wells A. Hutchins,[23] in which he illustrated the coequal nature of the rights of riparian owners as follows:

> The use of water on tract 'G' may have begun fifty years ago and may have been continuous, and valuable improvements may have been made which will be seriously [impaired] if the tract is deprived of the use of a substantial part of the stream flow; yet the owner of tract 'E' may begin use today and lawfully demand his share of the flow, with the result that tract 'G' will hereafter be entitled to only a partial use of the stream. The riparian right does not depend upon use and is not lost by nonuse. This is in direct conflict with the appropriative right, which may be declared forfeited if nonuse of the water continues for a period prescribed by statute, and which can be lost instantly by abandonment of the right.[24]

Other decisions further defined the nature and characteristics of the property interest recognized in the riparian right. Two cases decided shortly after Thomas v. LaCotts resolved some of the unanswered questions concerning the

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[21] Meriwether Sand & Gravel Co. v. State, 181 Ark. 216, 26 S.W.2d 57 (1930); Thomas v. LaCotts, 222 Ark. 171, 257 S.W.2d 936 (1953).

[22] 222 Ark. 171, 257 S.W.2d 936 (1953).

[23] Wells A. Hutchins is best known for a three-volume treatise, Water Rights Law in the Nineteen Western States, which was completed after his death by Harold H. Ellis and J. Peter DeBraal of the Economic Research Service of the United States Department of Agriculture. He devoted his entire professional career to the study and articulation of water laws and institutions. He spoke at Stuttgart in January, 1940, on water rights. See Thomas v. LaCotts, 222 Ark. at 177-178, 257 S.W.2d at 940.

[24] Id.

nature of the right. In Harrell v. City of Conway,[25] the court quoted cases from Pennsylvania and Kansas to support the conclusion that riparian rights do not extend to taking water from a stream and selling it beyond the limits of the watershed.[26] The quoted Kansas cases specifically referred to the necessity of compensation to those deprived of water rights by a public agency. The court suggested that an eminent domain procedure would be necessary in such cases, thus affirming the vested nature of the right.[27]

A year later, in Harris v. Brooks,[28] the Arkansas Supreme Court was faced with a direct conflict between two riparian owners. The court used the occasion to clarify certain aspects of the riparian rights doctrine as applied in Arkansas.[29] The court recognized the vested rights concept set forth in Meriwether Sand & Gravel v. State[30] and Thomas v. LaCotts[31] and

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[25] 224 Ark. 100, 271 S.W.2d 924 (1954).

[26] Id. at 104, 271 S.W.2d at 927.

[27] Id. at 106, 271 S.W.2d at 928.

[28] 225 Ark. 436, 283 S.W.2d 129 (1955).

[29] See supra text accompanying note 43 for a discussion of the court's clarification regarding the extent and scope of the riparian right. The court, in adopting the reasonable use theory of riparian rights, cautioned that all interpretations given the theory in the decisions of other states were not necessarily being adopted in Arkansas and that it would be necessary for the court to develop its own interpretations in the future. Harris v. Brooks, 225 Ark. at 443-444, 283 S.W.2d at 134.

[30] 181 Ark. 216, 26 S.W.2d 57 (1930).

[31] 222 Ark. 171, 257 S.W.2d 936 (1953).

indicated that these rights could not be constitutionally negated. The court quoted the following language in Meriwether: "Riparian rights inhere in the owner of the soil and are part and parcel of the land itself, and are vested and valuable rights which no more may be destroyed or impaired than any other part of a freehold."[32] Although the nature of the right, under all these decisions, is considered to be a vested property right, the court has made it clear that the right is not absolute but is qualified for both surface water and groundwater. In adopting the riparian reasonable use concept for groundwater, the court in the 1957 case of Jones v. Oz-Ark-Val Poultry Co.[33] quoted from the Restatement of Torts: "Therefore, each possessor's rights and privileges with respect to the use of subterranean waters are qualified rather than absolute for the same reasons that each riparian proprietor's rights and privileges with respect to the use of water in the watercourse or lake are qualified and not absolute."[34]

Further, in a case involving the rights of adjoining landowners to a stream bed, Justice Hickman, dissenting in part because he felt the court had not fully considered the water rights involved, stated, "A riparian owner does not own the water flowing past his land. . . . [He] merely [has] the right to use

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[32] Harris v. Brooks, 225 Ark. 436, 444 n.3, 283 S.W.2d 129, 134 n.3 (1955) (quoting Meriwether Sand & Gravel v. State, 181 Ark. 216, 226-27, 26 S.W.2d 57, 61 (1930)).

[33] 228 Ark. 76, 306 S.W.2d 111 (1957).

[34] Id. at 82, 306 S.W.2d at 115.

it without damaging the rights of other owners."[35]

Another aspect of the nature of the riparian right is the question of whether it is subject to loss through prescription. If it is considered property, then ordinarily a prescriptive right can be established. In Harrell v. City of Conway,[36] the Arkansas Supreme Court recognized that prescription might be possible but held that a lower riparian owner could not acquire rights to full flow from upper riparians merely because the upper riparian does not use or interrupt the flow of the steam. Quoting Farnham on Water the court stated:

> It may be that the upper owner has had no use for the water, but the mere fact that he had none, and did not attempt to make any use of it, cannot deprive him of any of his rights or entitle the lower owner to insist that the flow shall continue uninterrupted, in case the upper owner finds use for the water.[37]

The right to sever riparian rights from the land to which it attaches is also a characteristic of the property right sometimes in question. Although the court has referred to the riparian right as "inhering in the owner of the soil"[38] and an "incident to the ownership of land,"[39] it is also clear that the court has seen the commercial sale of water -- at least off-tract -- as

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[35] Nilsson v. Latimer, 281 Ark. 325, 331, 664 S.W.2d 447, 451 (1984) (Hickman, J., dissenting).

[36] 224 Ark. 100, 271 S.W.2d 924 (1954).

[37] Id. at 106, 271 S.W.2d at 928.

[38] Thomas v. LaCotts 222 Ark. 171, 257 S.W.2d 936 (1953); Meriwether Sand & Gravel Co. v. State, 181 Ark. 216, 26 S.W.2d 57 (1930).

[39] Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955).

being inconsistent with riparian rights.[40] However, in a groundwater case, Lingo v. City of Jacksonville,[41] the court indicated that it would be permissible for a riparian owner to remove subterranean and percolating water and to use or sell it away from the tract from which it is pumped if such use did not injure the common supply of riparian owners.

Apparently the Arkansas Supreme Court has not had the occasion to rule directly on the question of severability in surface water situations where the right has been expressly conveyed or reserved, separate and apart from the land. Other courts have found severability to be a generally recognized characteristic of the riparian right.[42]

B. Scope and Extent of the Riparian Right

Arkansas formally adopted the riparian rights concept of reasonable use in 1955 in Harris v. Brooks.[43] In doing so, the court clarified several aspects of the scope and extent of the riparian right and stated a number of general rules and principles applicable in Arkansas:

> (a) The right to use water for strictly domestic purposes -- such as for household use -- is superior to many other uses of water -- such as for fishing, recreation and

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[40] Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924 (1954).

[41] 258 Ark. 63, 522 S.W.2d 403 (1975).

[42] See, e.g. Commonwealth of Virginia, Marine Resources Comm'n v. Forbes, 214 Va. 109, 197 S.E.2d 195 (1973); Thurston v. City of Portsmouth, 205 Va. 909, 140 S.E.2d 678 (1965); Hite v. Town of Luray, 175 Va. 218, 8 S.E.2d 369 (1940) and cases cited therein.

[43] 225 Ark. 436, 283 S.W.2d 129 (1955).

> irrigation.
>
> (b) Other than the use mentioned above, all other lawful uses of water are equal.
>
> Some of the lawful uses of water recognized by this state are: fishing, swimming, recreation and irrigation.
>
> (c) When one lawful use of water is destroyed by another lawful use the latter must yield, or it may be enjoined.
>
> (d) When one lawful use of water interferes with or detracts from another lawful use, then a question arises as to whether, under all the facts and circumstances of that particular case, the interfering use shall be declared unreasonable and as such enjoined, or whether a reasonable and equitable adjustment should be made, having due regard to the reasonable rights of each.[44]

In Scott v. Slaughter,[45] the court reaffirmed that the right to use water for strictly domestic purposes is superior to other uses such as fishing, recreation, and irrigation and that, other than use for domestic purposes, all other lawful uses are equal.

A basic feature of the riparian concept of reasonable use is that the water right can vary over time in response to changed conditions. It is conceivable that use considered reasonable at one point in time may become unreasonable due to substantial changes in water use patterns, streamflow variations, or other factors.[46] The exercise of dormant rights by riparian owners of previously undeveloped riparian property may require adjustment in previous uses. In adopting the reasonable use concept for groundwater in 1957 in Jones v. Oz-Ark-Val Poultry Co.,[47] the

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[44] Id. at 444-445, 283 S.W.2d at 134.

[45] 237 Ark. 394, 373 S.W.2d 577 (1963).

[46] See supra note 7 for a list of the various factors typically considered.

[47] 228 Ark. 76, 306 S.W.2d 111 (1957).

Arkansas Supreme Court quoted from a California case:

> Where two or more persons own different tracts of land, underlaid by porous material extending to and communicating with them all, which is saturated with water moving with more or less freedom therein, each has a common and correlative right to the use of this water upon his land, to the full extent of his needs, if the supply is sufficient, and to the extent of reasonable share thereof, if the supply is so scant that the use by one will affect the supply of the others.[48]

Thus, the Arkansas position is that the limitation on the scope of water right is similar for both surface water and groundwater in that both are subject to modification by the implementation of new uses by other riparian landowners or other users of groundwater.

C. Place of Water Use Under the Riparian Doctrine

Basically, the riparian rights doctrine limits the right to use water to those who are riparian landowners and limits use to land within the same watershed. With regard to the definition of riparian land, a basic requirement is physical contact with the stream. The Arkansas Supreme Court has never had the occasion to determine precisely which land is considered to be riparian. Two different tests have been used to resolve the question when it has arisen in other states.[49] Under the "source of title" test, only land held as a single tract throughout its chain of title retains riparian status, and the rights do not reattach even if

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[48] Id. at 81, 306 S.W.2d at 115 (quoting Hudson v. Dailey, 156 Cal. 617, 105 P. 748 (1909)).

[49] Levi and Schneeberger, supra note 5.

the land is later reacquired by a riparian owner.[50] Under the second test -- the "unity of title" test -- any contiguous tracts in the same ownership have riparian status regardless of when the title was acquired.[51]

Justice McFaddin, in a concurring opinion in Harrell v. City of Conway,[52] summarized what he called his "individual conclusions" on riparian rights. In doing so he included the following:

> It is possible for riparian rights to exist on both sides of the stream up to the farthest extent of the water shed. But this riparian right is an ever contracting right and never an expanding right: that is, the riparian right may grow smaller by conveyances, but can never grow larger. Suppose the Sovereign of the soil conveys a tract of 160 acres adjacent to the stream. The extent of the Sovereign's grant limits the riparian use of the water; and a tract lying immediately behind the 160-acre conveyed tract has no riparian rights because the grant has cut off such other land from the stream. If the grantee of the 160-acre tract should convey the 80 acres immediately adjacent to the stream, the riparian rights contract to the conveyed tract; and the remaining 80-acre tract--not adjacent to the stream--loses all riparian rights. Should the riparian owner of the 80-acre tract on the stream later purchase the land behind the 80-acre tract such purchased land would not

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[50] Under this test the amount of land considered to be riparian would constantly decrease and never increase. See, e.g. Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 81 P.2d 533 (1935); Title Ins. & Trust Co. v. Miller & Lux, 183 Cal. 71, 190 P. 433 (1920); Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978 (1907); Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733 (1905).

[51] Under this test the amount of land considered to be riparian would expand with the acquisition of contiguous land even if the acquired land had been continuously nonriparian. See, e.g., Clark v. Allaman, 71 Kan. 206, 80 P. 571 (1905); Slack v. Marsh, 11 Phila. 543 (C.P. Pa. 1875). See also Farnham, The Permissible Extent of Riparian Land, 7 Land & Water L. Rev. 31 (1972).

[52] 224 Ark. 100, 271 S.W.2d 924 (1954) (McFaddin, J., concurring).

re-acquire riparian rights.[53]

With regard to the degree to which the "place of use" restriction is actually enforced, the Arkansas Supreme Court has indicated that the appropriate time for an evaluation of the relative rights of riparian owners is when one riparian owner's use "harmfully invades" another's interest in his use. The court has referred to the "incompatibility of interest between the two parties" as raising "immediately a question" as to the permissibility of the use.[54]

A somewhat different question might arise when a diversion and use are made on nonriparian land as was the case in Harrell v. City of Conway.[55] There the court stated that such diversions were not appropriate under the theory of riparian rights and indicated that the diversion could be prohibited.[56] On the other hand, in Lingo v. City of Jacksonville,[57] the court emphasized the necessity of harm as a basis for enjoining the transfer of groundwater from riparian land while indicating that a transfer from the overlying land would be permissible where no harm

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[53] Id. at 108, 271 S.W.2d at 929 (McFaddin, J., concurring).

[54] Harris v. Brooks, 225 Ark. 436, 446, 283 S.W.2d 129 (1955) (quoting Restatement of Trost § 852c). Quoting further:

> Hence it is only when one riparian proprietor's use of the water is unreasonable that another who is harmed by it can complain, even though the harm is intentional.

[55] 224 Ark. 100, 271 S.W.2d 924 (1954).

[56] Id. at 104, 271 S.W.2d at 927.

[57] 258 Ark. 63, 522 S.W.2d 403 (1975).

resulted to other overlying landowners.[58]

In other states, some cases can be found where nonriparian use has been held invalid without regard to the question of injury,[59] although the general rule would seem to be that use on nonriparian land would be allowed in situations where other riparian owners are not injured thereby.[60]

III. STATUTORY CHANGES IN THE ARKANSAS RIPARIAN RIGHTS SYSTEM

A. Changes in the 1950s and 1960s

In the face of conflicts over water use during the drought years of the early 1950s, suggestions were made by the Arkansas Supreme Court that Arkansas should modify its riparian rights system by legislation. The court in Thomas v. LaCotts[61] referred to a 1940 speech in Arkansas by Wells A. Hutchins in which he outlined suggestions regarding the "need [for] statutory control of water in this state before the problem becomes too complex

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[58] Id.

[59] Mackleton Hotel Co. v. Connellsville and State Line Ry., 242 Pa. 569, 89 A. 703 (1914).

[60] See Stratton v. Mt. Hermon Boys' School, 216 Mass. 83, 103 N.E. 87 (1913); Virginia Hot Springs Co. v. Hoover, 143 Va. 460, 130 S.E. 408 (1925). The Virginia court quoted the Massachusetts court:

> If he diverts the water to a point outside the watershed or upon a disconnected estate, the only question is whether there is actual injury to the lower estate, for any present or future reasonable use. The diversion alone, without evidence of such damage, does not warrant a recovery of even nominal damages.

143 Va. at 467, 130 S.E. at 410.

[61] 222 Ark. 171, 257 S.W.2d 936 (1953).

with growth of population."[62] In Harrell v. City of Conway,[63] Justice McFaddin referred to the "necessity of legislation, certainly as to surface water and possibly also as to subterranean water."[64] Partially in response to Justice McFaddin's call, the 1955 session of the Arkansas General Assembly considered the development of a comprehensive bill designed to replace the riparian rights system with an appropriation system.[65] This bill, withdrawn by the sponsor and never voted on, was debated in the legislature and, because of the severity of the drought in the early 1950s, it generated considerable interest in water rights legislation throughout the state. The major objections to the bill were that it provided for state control and for preferential treatment to previous water users.[66]

Since this comprehensive approach was not adopted, the General Assembly enacted legislation in 1957 indicating approval of the reasonable use concept and authorizing the Soil and Water

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[62] Id. at 177, 257 S.W.2d at 940. This speech was apparently published by the University of Arkansas College of Agriculture. Justice McFaddin indicated a year later in Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924 (1954), that he had discussed water problems with Mr. Hutchins during the summer recess. 224 Ark. at 106 n.1.

[63] 224 Ark. 100, 271 S.W.2d 924 (1954).

[64] Id. at 107, 271 S.W.2d at 928 (McFaddin, J., concurring).

[65] S.B. 69 of 1955. See Ellis, Some Current and Proposed Water-Rights Legislation in the Eastern States, 41 Iowa L. Rev. 237 (1956).

[66] Id. Both problems resurfaced during the discussion of H.B. 60, 74th Gen. Assembly, Regular Session (1983).

Conservation Commission to allocate available water in a stream during periods of shortage.[67] This allocation was to be in such a manner that each affected person received a "fair share." The Commission was to consider the use which each person is to make of the water and to give "reasonable preferences" in the following order: (1) sustaining life, (2) maintaining health, and (3) increasing wealth.[68]

The same act established a permit system for dam construction.[69] This system requires that a permit be obtained to construct a dam on any stream for the purpose of impounding water to be used for any purpose."[70] This requirement does not apply to dams which are of a height less than twenty-five feet or which are below the ordinary high water mark on a stream.[71] Nor does the permit system apply to dams which impound less than fifty acre-feet of water.[72]

In 1969, the legislature required the registration of

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[67] 1957 Ark. Acts 81; Ark. Code. Ann. §§ 15-22-201 to 15-22-220.

[68] Ark. Code. Ann. § 15-22-217. "Fair share" was changed to "equitable portion" by a 1989 amendment. Act 469 of 1989.

[69] Ark. Code. Ann. §§ 15-22-210 to 15-22-214.

[70] Ark. Code. Ann. § 15-22-210.

[71] Ark. Code. Ann. § 15-22-214.

[72] Id. An exemption for dams which impounded less than twenty acre-feet of water was added by 1969 Ark. Acts 180 as was an exemption for any dam the height of which is at or below the ordinary high water mark on the stream. Ark. Code. Ann. § 15-22-214. The original legislation also exempted dams which consist of a levee or a part thereof constructed or maintained by a drainage or levee district. Act 81 of 1957.

diversions of water from streams, lakes, or ponds (except those lakes or ponds within the exclusive ownership of one person).[73] The registration must include information on the source of the water, location and manner of diversion, whether a dam is utilized, purpose of use of the water, estimated quantity location of the land on which the water is used, description of lands irrigated, kinds of crops, and times during which diversion is proposed.[74]

The 1957 legislation empowered the Commission to issue dam construction permits and to make allocations during shortages "to the extent and in the manner provided by law."[75] This provision appears to have been an effort on the part of the legislature to approve the riparian rights concept of reasonable use as it had been interpreted by the Arkansas courts while at the same time allowing the Commission more power to resolve conflicts during times of shortage. The Commission apparently operated fairly successfully under the general guidelines of the statute until challenged in a 1981 Chancery Court proceeding in Pulaski County.[76] In that proceeding the chancellor ruled that any Commission action in making allocations would be arbitrary because the Commission had not adopted any rules or regulations

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[73] 1969 Ark. Acts 180, Ark. Stat. Ann. § 15-22-215.

[74] Id.

[75] Ark. Code. Ann. § 15-22-205(3).

[76] Henry v. Arkansas Soil and Water Commission, Arkansas Gazette, Dec. 6, 1981, at 10A, col. 1 (Pulaski County Chancery Court, Dec. 4, 1981).

for making allocation decisions. As a result of this proceeding, the Commission adopted detailed regulations for the allocation of water during shortages.[77]

The 1969 legislation was designed to supplement the dam construction permit system and the allocation system by adding the requirement of registration for surface water use. Interestingly, the legislation originally specifically excluded any penalty provisions for failure to comply.[78] The legislation does require registration before a person can be granted an allocation above that required for domestic use but specifically states that even registration does not operate "to allow nonriparian use of water to supercede, subordinate or otherwise take priority or precedence over a riparian right to divert water from a stream, lake or pond."[79]

This section operates to affect the rights of riparian water users but, presumably, makes no real change regarding the rights of riparians who are not currently taking water from streams, other than to require registration if a use is implemented. Registration would be necessary to receive consideration in an

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[77] Arkansas Soil and Water Conservation Commission Rules & Regulations, Title III, "Rules for the Utilization of Surface Water," [hereinafter "Rules"].

[78] Ark. Code. Ann. § 15-22-215. A 1989 amendment added penalties for failure to register a diversion. Ark. Code Ann. § 15-22-215(g).

[79] Ark. Code. Ann. § 15-22-215(f).

allocation procedure during a period of shortage under the Code.[80] However, section 15-22-205(3) of the Arkansas Code only authorizes the Commission to make allocations "to the extent and in the manner provided by law." A question arises as to whether a riparian landowner who had not previously registered a use could be prevented from continuing that use by Commission order during a shortage if, by law, the riparian right is vested. Perhaps the intent of the legislature was to allow the Commission the authority to apply the riparian rights concept of reasonable use in making allocation decisions and to consider an unregistered use to be unreasonable so that it could be prohibited. The legislature, in these early provisions did not intend to extend rights to nonriparians. Certainly there was no intent to give nonriparian use any priority even if registered, although such use was, by implication, authorized if the use is registered.[81] Clearly, there was no security of right associated with the registration of a nonriparian use.

B. Legislation in the 1980s

Questions concerning the adequacy of the piecemeal legal principles developed by the courts and the 1957 and 1969 legislation led to the creation by the 1981 legislature of a Water Code Study Commission.[82] This group met throughout late

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[80] "[N]o party shall be granted any allocation of water above that required for domestic use unless he has complied with the provisions of this Section." Ark. Code. Ann. § 15-22-215(f).

[81] Ark. Code. Ann. § 15-22-215.

[82] 1981 Ark. Acts 466.

1981 and all of 1982 and eventually developed a proposal for a comprehensive water code for Arkansas. The proposal was rejected by the 1983 session of the legislature which, in turn, referred the question of water law revision to an interim committee for study.[83] That committee developed draft proposals for introduction in the 1985 legislative session, but no comprehensive bill was adopted. Groups opposed to the adoption of comprehensive legislation expressed concern about statewide regulation, interference with property rights, and the lack of readily available alternate sources of water in the event usage of current sources was restricted.

The 1985 legislature did pass legislation which significantly modified the riparian rights doctrine.[84] In fact, one could conclude that this legislation, when combined with the registration legislation and implementation of allocation rules authorized by the 1957 and 1969 legislation, ends Arkansas's reliance on the riparian rights doctrine for surface water allocation.

The specific provisions of the 1985 and subsequent amendments will be addressed below. An important aspect of the legislation was to increase the authority of the Arkansas Soil and Water Conservation Commission. The 1985 Act mandated that the Soil and Water Conservation Commission do the following:

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[83] H.B. 60, 74th General Assembly, Regular Session. Referred to an interim committee in 1983 Ark. Acts 376.

[84] 1985 Ark. Acts 1051 (Codified at Ark. Code Ann. §§ 15-22-301 to 304).

Complete a detailed inventory of water needs in the state, define critical water areas, define the term "excess surface water," establish minimum streamflows, indicate where excess surface water areas exist, and develop guidelines for the evaluation of any proposed transfers of water.[85] The legislation authorized the Commission to allow the transportation of excess surface water to nonriparian land (intrabasin or interbasin) in cases where a determination is made that excess surface water exists.[86]

The final requirement of the 1985 Act was to require the reporting of groundwater use. Persons who withdraw groundwater must report that withdrawal on an annual basis, except for individual household wells used exclusively for domestic use and wells having a maximum potential flow rate of less than 50,000 gallons per day.[87]

Following the adoption of the legislation in 1985 the Commission has had to develop new rules for the utilization of excess surface water. In the process, the Commission has developed rules that incorporate the rules for allocation of surface water during periods of shortage with the overall surface water diversion and transfer authorization rules.[88]

The rules reflect the legislative determination to move away

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[85] Ark. Code Ann. § 15-22-301.

[86] Ark. Code Ann. § 15-22-304.

[87] Ark. Code Ann. § 15-22-302.

[88] Rules §§ 301.1 to 313.2.

from the riparian rights system to an agency administered system. The Arkansas legislation is specifically based on an interest in making a more efficient use of the state's water resources.[89] This is one of the usual goals of water legislation and is one of the criteria by which an allocation system may be judged.[90]

Clearly, the series of legislative changes in Arkansas water law, starting in 1957, indicate movement away from the riparian rights system with regard to surface water. The provisions for nonriparian transfer and agency allocation during shortage suggest that the legislature has committed to an administrative system of surface water utilization. Yet, with the exception of the reporting requirements, until 1991 none of the legislative focus had been upon Arkansas's most serious water problem -- that of groundwater depletion.

C. The 1991 Legislation on Groundwater Regulation

Serious depletion of underground sources of irrigation water is a major concern in those areas of the state where most of the irrigated cropland is located. In addition, serious water level declines have resulted from large withdrawals for industrial and municipal supplies in some areas As a result of heavy pumping,

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[89] The rules indicate the purpose is "to encourage and facilitate the conservation, development and efficient use of surface water." Id. § 301.1(a).

[90] A set of criteria which includes reference to "highest and best use" (efficiency) is set out in a report by W. Cox, L. Shabman, S. Batie & J. Looney, Virginia's Water Resources: Policy and Management Issues 1-2 to 1-3 (1981).

salt water intrusion into some wells is an emerging problem.[91]

The criticism of the riparian rights system as lacking in certainty is applicable to the rule applied to resolve groundwater disputes in Arkansas. The right to use groundwater is not fixed in magnitude, and the questions of whether a particular use or level of use is reasonable can only be determined by resort to litigation, and then only after all the circumstances surrounding a given use are evaluated.[92] The right is always subject to modifications by the implementation of new uses by other owners.

As to flexibility, the groundwater rule, as interpreted in Arkansas, would apparently permit the transfer of water from the overlying land if such use does no injury to the common supply of all riparian owners.[93] The problem in Arkansas is that the supply in many areas is so inadequate that any transport could be considered an injury to the common supply and would be prohibited by application of the reasonable use test.

The public's interest is, of course, affected by unrestrained groundwater development. It is for this reason -- and to reduce potential conflicts between users of groundwater -- that several states have evaluated their groundwater regulatory

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[91] Arkansas Water Plan, Executive Summary, Arkansas Soil and Water Conservation Commission (June, 1990).

[92] Jones v. Oz-Ark-Val Poultry Co., 228 Ark. 76, 306 S.W.2d 111 (1957).

[93] Lingo v. City of Jacksonville, 258 Ark. 63, 522 S.W.2d 403 (1975).

mechanisms and have made significant changes either by administrative rulings or by legislation. For example, in 1980, Arizona adopted the most extensive groundwater management statute in the country.[94] Nebraska, which follows a combination of the reasonable use rule and statutory preferences, adopted a Ground Water Management Act in 1976 which established controls on groundwater use by irrigators.[95] These changes have not been confined to western states. Georgia provided for the regulation of use of groundwater in certain situations in 1972.[96] Virginia adopted a Ground Water Management Act in 1973 which provides for state regulation of critical groundwater areas.[97]

In water management legislation adopted in Florida,[98] the most comprehensive of any eastern state, the regulation of groundwater as well as surface water is included. In addition, Delaware, Indiana, Iowa, Kentucky, Maryland, Minnesota, New Jersey, North Carolina, South Carolina, and Wisconsin have all

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[94] Ariz. Rev. Stats. Ann. §§ 45-401 to 45-407. See Johnson, The 1980 Arizona Groundwater Management Act and Trends in Western States Groundwater Administration and Management: A Minerals Industry Perspective, 26 Rocky Mt. Min. L. Inst. 1031 (1980).

[95] Neb. Rev. Stat. §§ 46-601 to 46-655. See Aiken, Nebraska Ground Water Law and Administration 59 Neb. L. Rev. 917, 925 (1980).

[96] Ga. Code Ann. §§ 12-5-95 to 12-5-422.

[97] Va. Code Ann. §§ 62.1-44.35 to 62.1-44.44.

[98] Fla. Stat. Ann. §§ 373 to 373.201.

established permit systems for groundwater withdrawals.[99]

The steps toward conversion to surface water are in place with the movement away from the riparian rights system and the specific authorization of nonriparian transfers. In addition, the Arkansas Water Resources Development Act of 1981 authorizes the Commission to issue bonds for the development of water resources for domestic, agricultural, industrial, and other essential purposes.[100] This Act was specifically designed to provide financial assistance for projects which would make surface water available in areas dependent on groundwater.

However, the conversion to surface water will not occur rapidly. Projects for interbasin and nonriparian transfer will be costly and take time to develop. Even nonriparian transfers of an intrabasin nature will require financial resources beyond that of many individuals who might benefit from such transfers. For this reason, continued emphasis must be placed on groundwater pumping strategies that may serve to achieve some level of reduction in the depletion rates.[101] This likely means that additional regulatory authority will be necessary to effectively address these problems. Such authority was proposed in the Water Code Study Commission proposals in the 1983 legislative session but was deleted after objections from the agricultural community

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[99] The legislation in these states is summarized by Ausness, supra note 9, and citations to the specific statutes may be found therein.

[100] Ark. Code Ann. §§ 15-22-601 to 622.

[101] Arkansas Water Plan, supra note 91.

and well-drillers.[102]

In the 1991 legislative session, the General Assembly attempted to address some of the deficiencies in the law with regard to Groundwater. The result was the "Arkansas Groundwater Protection and Management Act" which puts in place a potential regulatory scheme for groundwater. This regulatory program, which may apply only in areas designated as "critical groundwater areas," is designed in such a way that controls on groundwater may be implemented at some point in the future primarily through a permitting scheme (called "water rights" in the legislation.) The details of this program will be discussed below. Suffice it to say, this legislation represents a major movement away from the traditional case-by-case adjudication of groundwater disputes toward an administrative system to address groundwater depletion problems in the state.

IV. WATER DISTRIBUTION

One of the primary objectives of a water allocation system is to facilitate application of water to its highest and best use. Beneficial uses of water may be desired at some point other than at a riparian location. Thus, the watershed limitation and the riparian land limitation contribute to inefficient resource use in riparian states.[103] Diversions to nonriparian lands, even within the same watershed, and interbasin transfers are both

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[102] Looney, Modification of Arkansas Water Law: Issues and Alternatives, 38 Ark. L. Rev. 221 (1984) at 247.

[103] Levi and Schneeberger, supra note 5, at 443-47.

subject to challenge under the riparian rights system as applied by the Arkansas Supreme Court.[104]

The legislature has addressed mechanisms for expanding availability of water through public suppliers. Current law permits municipal suppliers to divert and take water for public use by acquiring lands by eminent domain for waterworks purposes.[105] The Arkansas Supreme Court has indicated that, in the absence of such an eminent domain proceeding, a city's riparian rights "are the same as any other riparian owner and no greater."[106]

The Arkansas Regional Water Distribution District Act also permits nonprofit, regional water-distribution districts to be organized for the purpose (among others) of acquiring water "from wells, lakes, rivers, tributaries, or streams of or bordering this State" and the "transportation and delivery of said water to persons who are furnished said water by the water district."[107] The Arkansas Supreme Court has interpreted the provisions of this act to include not only distribution for municipal and industrial uses but for agricultural water supply purposes as well.[108] The

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[104] Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924 (1954).

[105] Ark. Code. Ann. §§ 18-15-601.

[106] Harrell v. City of Conway, 224 Ark. 100, 105, 271 S.W.2d 924, 927 (1954).

[107] Ark. Code. Ann. §§ 14-116-102.

[108] Lyon v. White River-Grand Prairie Irrigation District, 281 Ark. 286, 664 S.W.2d 441 (1984).

court has also ruled that the "powers" section of the act gives such districts the authority to acquire title to water from sources other than federal impoundments.[109] Presumably, such districts may exercise the power of eminent domain for acquiring water rights since the authorization for eminent domain power includes the purpose of acquiring rights of way "and other properties" necessary for the operation of the district.[110] There is some indication that the legislature wished to preserve existing rights of riparian owners while giving such districts broad powers. This is evident in the section authorizing such districts to use the beds of streams in the operation of its transportation systems if such use can be made "without adversely affecting existing riparian rights."[111]

Similar provisions exist for the formation and operation of irrigation districts under the Arkansas Irrigation, Drainage and Watershed Improvement District Act of 1949,[112] which, among other things, authorizes "the acquisition by purchase, lease, gift or condemnation of water rights and all other properties, . . . and all other rights helpful in carrying out the purposes of the organization of the district."[113] The governing boards of such

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[109] Id. at 291, 664 S.W.2d at 443 (construing Ark. Code. Ann. § 14-16-402.

[110] Ark. Code. Ann. § 14-16-402(10).

[111] Ark. Code. Ann. § 14-16-402(9).

[112] Ark. Code. Ann. §§ 14-16-101 to 14-16-427.

[113] Ark. Code. Ann. § 14-117-304.

districts are authorized to make regulations for "the delivery of water owned or acquired by it to users . . . ."[114]

The authorization to public suppliers to use eminent domain to acquire water rights reduces the uncertainty associated with the riparian doctrine since it is not likely that such uses will be enjoined once facilities are developed. However, considerable uncertainty still exists with regard to the application of the statutory powers to a given situation. Not the least important of the questions would be: which riparian owners would have to be a party to a condemnation action involving the acquisition of water rights in a particular stream? The limitations imposed by the riparian doctrine create a disincentive for investment in such major water supply facilities.

Question 1. The success of the Grand Prairie Demonstration Project will hinge on the state or some other entity's authority to regulate and/or restrict groundwater withdrawals. Is this provided by existing law? Does an alternative source of water have to exist?

The 1991 Arkansas Groundwater Protection and Management Act[115] suggests that limitation of groundwater withdrawals "through the use of water rights" may become necessary in critical groundwater areas. The concept appears in the purpose

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[114] Id.

[115] Acts 1991, No. 154, Ark. Code Ann. § 15-22-901 to 914.

statement of the Act[116] but there is some question as to how effectively the remainder of the Act accomplishes this purpose.

In order to implement any type of regulatory program affecting groundwater (which the purpose statement suggests are to apply only in critical groundwater areas) it is necessary for the Arkansas Soil and Water Conservation Commission to define such areas under its authority to develop the Arkansas Water Plan.[117] Under the 1985 legislation the ASWCC was required to define critical water areas and to delineate areas now critical or which will be critical within the next thirty years.[118]

The Commission did this in the Arkansas Water Plan by identifying critical groundwater areas as those in which the "quantity of groundwater is rapidly becoming depleted or the quality is being degraded." The areas identified include the alluvial aquifer in Lonoke, Prairie, Craighead, Poinsett, Drew, and Ashley counties. In addition, irrigation withdrawals in the Memphis sand aquifer have caused areas of Poinsett and Cross counties to be considered critical, as have industrial and public water supply withdrawals from the Sparta Sand aquifer in Union and Columbia counties. Quality problems in Lee and Phillips counties and migration of saltwater in Lincoln, Desha, Monroe, Chicot, Miller, and Lafayette counties have created critical

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[116] Ark. Code Ann. § 15-22-902.

[117] Ark. Code Ann. § 15-22-903(6) and 15-22-503. Also see Ark. Code Ann. § 15-22-301(9).

[118] Acts 1985, No. 1051, Ark. Code Ann. § 15-22-301(9).

situations in these areas as well.

The 1991 Act requirements go beyond mere definition of critical areas in the Arkansas Water Plan but require that before any regulatory program be implemented the areas be designated as such, following public hearings in each county within the proposed critical areas. Prior to these hearings the ASWCC must describe the proposed action, the reasons for the designation and the recommended boundaries of the critical area.[119] Presumably, the notice and comment procedure for rule-making would be required before final designation since there is reference to the Arkansas Administrative Procedure Act.

The ASWCC has not yet concluded all procedures necessary to designate the area within the Eastern Arkansas Region Study Area, including all of the Grand Prairie Area Demonstration Project and all of the land within the White River Regional Irrigation Water Distribution District, as a critical groundwater area.

Even when the area is formally designated as a critical groundwater area, this designation alone does not provide ASWCC with the authority to immediately implement a regulatory program affecting groundwater withdrawal in the designated area. A second determination by ASWCC is required, that is, that the initiation of regulatory authority within a critical area is necessary.[120] This declaration, also, must be made in accordance with procedures outlined in the Arkansas Administrative

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[119] Ark. Code Ann. § 15-22-908.

[120] Ark. Code Ann. § 15-22-909.

Procedures Act and must follow public hearings in each county within the proposed area.[121] Any difference in boundaries from the previously designated critical areas must be described in the proposal, as well as the reasons for any such changes.[122]

Since the ASWCC has not yet designated critical groundwater areas it has not made any required declaration under this section of the Act. Thus, no regulatory program may be initiated until this procedure for declaration of necessity has been followed.

Once the ASWCC has made the critical area designation and the declaration of necessity, a regulatory program may be implemented through a system based on the issuance of "water rights."[123] It is apparently through the use of a water rights program that the primary limitation of groundwater withdrawals is to occur. Presumably, this would be accomplished primarily through the limitations imposed on the issuance of new water rights in these areas since the legislation carefully preserves the rights of users of groundwater who have wells existing at the time the regulatory program is put in place as well as those who construct wells within the first year of initiation of the program ("grandfathered" rights). However, the ASWCC authority is not limited to the operation of a water rights program. In fact, the Act specifically requires that the ASWCC develop a comprehensive groundwater protection program which shall include

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[121] Ark. Code Ann. § 15-22-909(3).

[122] Ark. Code Ann. § 15-22-909(2).

[123] Ark. Code Ann. § 15-22-902, 909(a).

among its elements "the classification of groundwater and establishment of groundwater criteria and standards" and the "management of groundwater pursuant to this subchapter." which may include the issuance of water rights.[124] This broad authority, read in conjunction with the powers enumerated in the Act to "promulgate rules and regulations for groundwater classification and aquifer use, well spacing, issuance of groundwater rights,"[125] implies that it was intended that the ASWCC have broad authority to protect groundwater and that this authority not be limited to the water rights program per se. And, the fact that the section of the Act which limit's the powers of the ASWCC place some restrictions on when the Commission could reduce or limit the withdrawal from existing wells, suggests that such power otherwise exists.[126] For example, the Commission may not reduce or limit the withdrawal of water from existing wells with rights "grandfathered" unless alternative supplies are available, or could be made available at a cost no greater than the operating costs of the wells (including depreciation).[127] And, no such limitation or reduction in withdrawal can be made for any holder of a water right who has either reduced use of groundwater (after 1986) by 20% by institution of water conservation measures or conversion to

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[124] Ark. Code Ann. § 15-22-906.

[125] Ark. Code Ann. § 15-22-904.

[126] Ark. Code Ann. § 15-22-905.

[127] Ark. Code Ann. § 15-22-905(1).

surface water supplies or has implemented a water conservation plan employing generally accepted water conservation practices approved by the Commission.[128] Likewise, no regulation of withdrawal is authorized for either low volume wells (less than 50,000 gallons per day) or individual household wells used exclusively for domestic use.[129]

Subject to these specific limitations on the powers of the Commission, and the "grandfathered" rights provisions, a groundwater protection program developed by the Commission could regulate and/or restrict withdrawals of groundwater. While these limitations on the powers of the Commission would certainly affect the Commission's ability to restrict withdrawals, the greater impediment to any effective regulatory program may be the "grandfathered" rights provisions themselves.

Once a regulatory program is implemented the Act requires withdrawals from existing wells or construction of new wells to be under a "water right," essentially a permit.[130] The process for issuance of water rights requires that users of water from wells existing at the time the regulatory program is implemented apply within one year for the issuance of a "water right." Such a right is fully recognized, based on the average quantity withdrawn, applied to beneficial use and reported during the past three years. Some flexibility exists to allow earlier reports to

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[128] Ark. Code Ann. § 15-22-905(2).

[129] Ark. Code Ann. § 15-22-905(3)&(4).

[130] Ark. Code Ann. § 15-22-909(4).

be used in calculating the three year average where the reported use levels are "significantly below normal use levels."[131]

In addition, any new wells constructed during the first year of initiation of the regulatory program are likewise "grandfathered" based on the amount requested.[132] These "grandfathered rights" provisions, read in conjunction with the limitations on Commission powers, means that reduction or limitation of withdrawals from users from wells existing at the time the regulatory program is implemented could occur only in limited circumstances -- none at all unless alternative surface supplies are available or can be made available at a cost no greater than the operating costs of the person's wells. And, if the user demonstrates a reduction of 20% in the use of groundwater by implementation of water conservation measures or conversion to surface supplies or if the user has implemented a water conservation plan employing generally accepted water conservation practices approved by the Commission no reduction or limitation of withdrawals may be required.[133] These latter limitations on regulatory authority would also apply to those who were "grandfathered" because the wells were constructed within one year of implementation of regulatory authority and new applicants.

These limitations on any regulatory program are tempered

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[131] Ark. Code Ann. § 15-22-910(a)(1).

[132] Ark. Code Ann. § 15-22-910(a)(2).

[133] Ark. Code Ann. § 15-22-905.

somewhat by the concluding language in the section on issuance of groundwater rights which suggests that any water rights issued are "subject to review and modification by the commission."[134] Any such modification would apparently be subject to the limitations or reductions in withdrawals described above.

Question 2. What is the state's present authority relative to nonriparian water use, allocation limits, minimum instream flow requirements, and diversion of White River water?

A. Elimination of "Place of Use" Restrictions

To allow for more efficient utilization of surface water in Arkansas the 1985 Act allows transfers of water to nonriparian land under specified conditions.[135] The legislation does not mention "interbasin" transfers as such, but permits "transportation of excess surface water to nonriparians."[136] No restrictions are placed on transfers outside the watershed. Also, one of the factors to be considered by the Soil and Water Conservation Commission in determining whether excess surface water is available for transportation to nonriparians is the "future water needs of the basin of origin."[137] In addition, the definition of "excess surface water" refers to "that amount of water available on an average annual basis from any watershed . .

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[134] Ark. Code Ann. § 15-22-910(d).

[135] 1985 Ark. Acts 1051.

[136] Ark. Code Ann. § 15-22-304(a).

[137] Ark. Code Ann. § 15-22-304(b)(5)(emphasis added).

.".[138] Clearly, the legislature considered interbasin transfers in the authorization of transportation to nonriparian land. This authorization is consistent with the recommendation of the 1981 Water Code Study Commission which based much of its work on the premise that interbasin transfers should be allowed.[139]

The implementing rules of the Soil and Water Conservation Commission explicitly recognize the two possible types of nonriparian uses and set out separate but parallel procedures for approval of interbasin and intrabasin transfers.[140] For purposes of the interbasin transfer rules, the State is divided into five basins: Arkansas River Basin, White River Basin, Delta Basin, Ouachita River Basin, and Red River Basin.[141] The interbasin rules would be applicable to transfers from one of these basins to another. The intrabasin transfer rules would be applicable to any transfers within these basins. This administrative determination of the physical limits of a basin resolves a problem which courts must confront in considering the watershed restriction of the riparian doctrine. For purposes of the riparian doctrine, a transfer from one tributary of a major stream to another is usually considered as "beyond the

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[138] Ark. Code Ann. § 15-22-304(b)(emphasis added).

[139] See Minutes of the Water Code Study Commission (Nov. 5, 1981).

[140] Rules § 304.1-.16 (intrabasin); id. § 305.1-.20 (interbasin).

[141] Id. § 305.1.

watershed."[142] Designating in advance which transfers are considered interbasin transfers alleviates the difficulty of resolving this question as disputes arise.

Of particular concern in authorizing interbasin transfers is the question of damage to the originating basin and, in particular, the tributary that is the point of origin of the diversion. The 1985 Act specifies that the Commission is to consider the environmental impact of a proposed transfer -- presumably in both the originating and receiving basin.[143] In addition, the legislation directs the Commission to evaluate every proposal in terms of the availability at reasonable cost of alternative sources of water, along with the nature and extent of the impact of the transfer on other water uses.[144] Before a proposed interbasin transfer can be approved the agency rules require a determination of the supply of water available in the basin of origin as well as whether there are shortages in the receiving basin.[145] The proponent must prove that "no significant damages should result to the basin of origin as a result of the proposed transfer."[146] The application may be approved with special conditions to protect the environment of the "watershed"

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[142] Johnson & Knippa, Transbasin Diversion of Water, 43 Texas L. Rev. 1035 (1965).

[143] Ark. Code Ann. § 15-22-304(c)(2).

[144] Ark. Code Ann. § 15-22-304(c)(1),(3).

[145] Rules § 305.5(a), (d).

[146] Id. § 305.6(d).

of origin to "insure against an unacceptable adverse impact of the transfer on other lawful water uses."[147] Since the Commission has already determined the basins in which excess surface water exists, the apparent intent of the rules is to provide for protection in the actual area of proposed diversions. This is implied in the rules because the agency is to determine the amount of excess surface water "at the point of diversion of the basin of origin."[148]

Further, the fact that a Notice of Application for an interbasin transfer is to be published in the county from which the diversion would be made (as well as in the receiving county) implies that the Commission's concern at the time of the application is more localized than the entire basin.[149]

Nonriparian intrabasin transfers may be approved under a procedure similar to that for interbasin transfers.[150] The rules for intrabasin transfer, however, do not provide for public notice and less attention is directed toward protecting the point of origin. The rules do provide that approval is to be granted only after a determination that the water to be used is "excess" surface water, that it is for a reasonable and beneficial use,

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[147] Id. § 305.9. The term "watershed" is defined elsewhere in the Rules as "[t]he drainage area of a stream and its tributaries." Id. § 301.3(nn). Presumably, the term is used interchangeably with "basin."

[148] Id. § 305.5(b) (emphasis added).

[149] Id. § 305.4.

[150] Id. § 304.1-.16.

and that the transfer "will cause no significant adverse environmental impact."[151] A provision is included for special conditions to protect the environment of the watershed of origin and to insure against an unacceptable adverse impact on other lawful water users.[152]

The place of use restrictions of the riparian rights system contribute to inefficient resource use in riparian states.[153] To avoid challenge of transfers to nonriparian land, legislative modification of the riparian rights system was necessary. The 1985 Act did this by specifically authorizing nonriparian use under agency control. The legislation establishes general guidelines under which these transfers can occur. The Commission rules detail a procedure for approval of proposals for both intrabasin and interbasin transfers which appears to offer protection against environmental impacts and for lawful uses of water in the originating basin. By using an agency approval process the necessity of a procedure for adjudicating claims of holders of riparian rights affected by the transfers is avoided. This procedure should eliminate the possibility of a multitude of lawsuits that might otherwise result from those whose property interests would be infringed.

B. Administrative Allocation of Water

Another basic tenet of the riparian rights system is that

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[151] Id. § 304.2.

[152] Id. § 304.6.

[153] Levi & Schneeberger, supra note 5 at 443-47.

riparian landowners can implement a reasonable use at any time. The co-equal nature of the rights of riparian owners is illustrated in the quote by Wells Hutchins mentioned above.[154]

This basic concept has meant that courts must allocate available water in disputes between riparian owners regardless of when their uses commenced. In Arkansas, Harris v. Brooks[155] illustrates the necessity of such determinations. There the conflict was between a lessee of riparian land who conducted a commercial boating and fishing enterprise on a privately owned non-navigable lake and a rice farmer who used water from the lake for irrigation purposes. Because of the unusually dry conditions in the early 1950s, the water level of the lake was below normal. Continued pumping by the irrigator was found to unreasonably interfere with another lawful use even though the irrigation use had been underway for over twenty years before the boat docks were constructed.

When competition over uses occurs, as in Harris, the resolution through adjudication is generally inefficient and costly. Moreover, because of the delay inherent in the resolution of conflicts through the courts, this method is particularly unsuited to situations involving water use. This is one of the major criticisms of the riparian rights system.[156] As

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[154] See supra n.23 and accompanying text.

[155] 225 Ark. 436, 283 S.W.2d 129 (1955).

[156] National Water Commission, Water Policies for the Future 280-81 (June 1973).

a result, one of the first steps away from the riparian rights system is the adoption of an alternative decision-making process for water allocation. This has been done in a number of eastern states even though they retain other major features of the riparian rights system.[157]

Arkansas's initial movement away from the riparian rights doctrine occurred in 1957 with the adoption of legislation authorizing the Soil and Water Conservation Commission to allocate available stream water during periods of shortage.[158] For many years the Commission did not find it necessary to use this statutory authority -- perhaps because severe shortages were rare. However, in more recent years disputes over water use appear to be more common, especially in unusually dry years such as 1980 or 1988. The Commission's failure to adopt procedures for making allocations under the statute was successfully challenged in 1981.[159] Following this decision the Commission adopted new rules which have now been revised to make them compatible with the 1985 legislation and subsequent amendments.[160]

1. Order of Preference

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[157] Id.

[158] 1957 Ark. Acts No. 81 (codified at Ark. Code Ann. §§ 15-22-205(3), 217).

[159] See, supra, note 76 and accompanying text.

[160] Rules §§ 307.1-313.2.

A 1989 amendment to the statute authorizing administrative allocation attempts to provide additional guidance to the Commission in making allocation decisions.[161] The original allocation legislation provided that the Commission could, during periods of shortage, allocate the available water "among persons affected by the shortage of water in a manner that each of these may obtain his fair share of the available water remaining in the stream. . . ."[162] Because a variety of consumptive and non-consumptive uses might be involved, an effort was made in the original statute to indicate, by general categories, the order of preference: (1) sustaining life, (2) maintaining health, and (3) increasing wealth.[163] The 1989 amendment attempts to establish priority for certain specific uses and amends the language of the statute to provide for allocation "among the uses" (instead of "among persons") and substitutes "equitable portion" for "fair share."[164] Further, the amendment indicates that, prior to allocation, water for some needs is to be reserved. These include (1) domestic and municipal-domestic, (2) minimum streamflow, and (3) federal water rights.[165]

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[161] 1989 Ark. Acts 469 (amending Ark. Code Ann. § 15-22-217 and other sections).

[162] 1957 Ark. Acts 81 (codified as amended in Ark. Code Ann. § 15-22-217(a)).

[163] Ark. Code Ann. § 15-22-217(c).

[164] Ark. Code Ann. § 15-22-217(a) (as amended by 1989 Ark. Acts 469).

[165] Ark. Code Ann. § 15-22-217(e) (as amended by 1989 Ark. Acts 469).

The Commission rules are more specific. Once the reserved uses are met, allocation by the Commission gives preference in the following order: (1) agriculture, (2) industry, (3) hydropower, and (4) recreation.[166] Presumably, all of these uses are a subcategory of "increasing wealth" since the two higher statutory preferences ("sustaining life" and "maintaining health") are met by the reservation for domestic, municipal-domestic, and minimum streamflow purposes.

The recent reservation by statute for domestic, municipal-domestic, and minimum streamflow purposes is consistent with the earlier declaration that "sustaining life" and "maintaining health" are to be considered before any other allocations can be made. This is also consistent, in part, with the generally accepted view under the riparian rights doctrine that domestic uses are superior to any other.[167] "Domestic" uses as defined in the rules include use for "ordinary household purposes including human consumption, washing, the watering of domestic livestock, poultry and animals and the watering of home gardens for consumption by the household."[168] The inclusion of a category of "municipal-domestic" uses recognizes the distribution of domestic water by a central distribution system and defines the uses to include "human consumption, laundry, bathroom facilities, fire

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[166] Rules § 307.4.

[167] See, e.g., Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955).

[168] Rules § 301.3(q).

protection, and the watering of home gardens."[169] These definitions are an effort to recognize these superior uses as necessary to "sustain life" and "maintain health."

The category of "federal water rights," also a reserved use, is not defined by statute. In the regulations, however, reference is made to federal water rights: "There may be some water over which the United States has a preemptive right that is superior to rights of others."[170]

If the effort to recognize federal water rights was an attempt to meet any demands of the federal government for those uses traditionally associated with the federal government, such as interstate compacts and navigation, the statutory language designating "federal water rights" as a reserved use is unnecessary because it is already accounted for in another reserved category, "minimum streamflow." The statutory definition of "minimum streamflow" includes the quantity necessary to meet interstate compacts and navigation needs, which are recognizably "federal" in nature. Fish and wildlife, water quality, and aquifer recharge needs are also a part of minimum streamflow and, to a degree, these may be "federal" in nature as well.[171] Interestingly, in the rules hydropower is given lower

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[169] Id. § 301.3(x).

[170] Id. § 307.7.

[171] Ark. Code Ann. § 15-22-202(10) (Supp. 1989). This definition was incorporated in the Rules, § 301.3(w).

priority during allocations than industry and agriculture.[172] This could be construed as contradictory to the recognition of superior federal water rights if federal hydropower projects are included.

Another possible category of "federal right" was already recognized in existing legislation; that is, the right to acquire and use water stored in a federal government reservoir. The original 1957 legislation granted, "to the extent that the State of Arkansas can grant that right," the right to acquire absolute title to water stored in reservoirs created by federal agencies such as the Corps of Engineers.[173] The only requirement for the exercise of such a right is notice to the Commission along with an annual report of the amount of water withdrawn.[174]

If federal uses for federal facilities and federal lands was intended to be given reserved status, the granting of these rights is curious in light of the usual approach which recognizes that states may allocate their water under state allocation systems and that these federal uses are subject to state allocation program requirements.[175] There is, however, a line of reasoning that would grant the federal government special recognition of rights associated with federal lands. This

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[172] Rules § 307.4.

[173] Ark. Code Ann. § 15-22-218.

[174] Ark. Code Ann. § 15-22-218(b)-(d).

[175] See, e.g., United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899).

concept, referred to as a "federal reserved right," is premised on the theory that when the federal government withdraws land from the public domain it reserves water rights in appropriated water which may be exercised at any time.[176] Unless this reserved right was receiving legislative recognition in Arkansas, it is not clear what was intended by giving superior recognition to "federal water rights" beyond those included in categories for interstate compacts, navigation, and federal impoundments.

2. Riparian vs. Nonriparian Uses

The Commission rules on allocation also attempt to establish a priority of diversions by granting riparian uses a higher priority than nonriparian uses.[177] This is consistent with the 1969 amendment to the allocation legislation which grants the Commission authority to make allocations between uses. However, this amendment also specifically states in language referring to registration of diversions that the legislation does not operate

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[176] The reserved right doctrine is usually referred to as the "Winters Doctrine" from Winters v. United States, 207 U.S. 564 (1908). It has been applied in the western states where large tracts of federal land have been reserved for uses such as Indian reservations. The idea is of less consequence in riparian states because the federal government could assert rights as a riparian, as necessary. The concept might be extended to argue that the federal government also has other superior rights as well.

> If the constitutionally enacted statute gives an agency of the United States the power to perform a federal function on any federal land in any state, . . . and that function requires the use of water, no state's law can block or limit the use of the water or the acquisition of a water right.

Trelease, Federal-state Relations in Water Law, National Water Commission Legal Study No. 5 147 (1971).

[177] Rules § 307.4(b).

"to allow nonriparian use of water to supersede, subordinate or otherwise take priority or precedence over a riparian right to divert water from a stream, lake or pond."[178] This language was not eliminated from the statute in 1985, in spite of the explicit recognition of nonriparian uses. As a result, the allocation rules continue to give riparian uses a higher priority than nonriparian uses.

It would appear that all riparian diversions would take priority during an allocation over all nonriparian diversions even if the nonriparian use was of a higher preference in the "order of uses." For example, a riparian recreational use would apparently be of higher priority than a nonriparian agricultural use, even though "agriculture" is designated as first in the "order of uses."

One complicating factor is the provision in the rules that a riparian landowner who has "not previously diverted water nor timely registered any previous diversion," shall not be granted an allocation during shortages (above that required for domestic uses).[179] The 1969 amendment supports this rule in that it clearly provides that one is not entitled to be granted any allocation unless the user has complied with the registration requirements.[180] Thus, a nonregistered riparian use would receive a lower preference than allowed nonriparian uses even in light of

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[178] Ark. Code Ann. § 15-22-215(f).

[179] Rules § 307.9.

[180] Ark. Code Ann. § 15-22-215(f).

the original statutory language specifying that registration is not to operate in a manner which allows nonriparian uses to "supersede, subordinate or otherwise take priority or precedence over a riparian right . . . ."[181] The rules also add confusion on this point by specifically recognizing that nonriparian uses, previously authorized by the Commission, may be granted an allocation during shortages if the use does not interfere with specific enumerated uses.[182] These "enumerated uses" include the reserved categories (municipal-domestic, minimum streamflow, and federal water rights) and registered riparian users. However, reference is also made to a section in which one of the enumerated uses is the "unregistered riparian user." This language may have been intended to recognize the domestic uses of the unregistered riparian because the section referred to actually states: "Any riparian landowner who has not previously diverted water nor timely registered any previous water diversions with the Commission, may not be granted any allocation of water during times of shortage above that required for domestic use."[183]

Unfortunately, this allocation scheme does not clearly address the actual priority position of the riparian user who has previously used water but has not registered a diversion. On the one hand, such a non-registered user is entitled to no allocation

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[181] Id.

[182] Rules § 307.10.

[183] Id. § 307.9.

during a shortage because the legislation requires registration to be entitled to an allocation. On the other hand, the legislation retains language protecting "riparian rights" and the rules refer to the person who has "not previously diverted water nor timely registered" as one who is not entitled to a right to receive an allocation. The question of where the non-registered (but previously diverting) riparian user fits into the scheme of priorities is not addressed. The logical place seems to be ahead of all nonriparian uses if the statute is to be given any continued authority.

The allocation system can best be illustrated, schematically, as follows.

- uses under 325,900 gallons per water year
- diffused surface water
- water previously captured
- water in exclusion ownership
- water from tail water recovery
- non-consumptive use
- diversion from intermittent streams
- water captured under permit

} usable without allocation

- domestic and municipal-domestic
- minimum streamflow
  - interstate compacts
  - navigation
  - fish and wildlife
  - water quality
  - aquifer recharge
- federal water rights

} reserved uses prior to allocation

- riparian (registered)
  - agriculture
  - industry
  - hydropower
  - recreation
- riparian (non-registered, but previously used) ?
- nonriparian intrabasin
  - agriculture
  - industry
  - hydropower
  - recreation
- nonriparian interbasin transfer
  - agriculture
  - industry
  - hydropower
  - recreation
- interstate
  - agriculture
  - industry
  - hydropower
  - recreation
- riparian (non-registered, not previously used)

3. Water Usable Without Allocation

Another interesting aspect of the allocation system is the Commission's effort to exclude certain categories of use from the allocation rules altogether. The rules contain a list of "water usable without allocation."[184] These include:

> (a) Diversions by any persons of less than 325,900 gallons (1 acre-foot) of water in any water year. (b) Water captured by tailwater recovery systems. (c) Water diverted from lakes, ponds, reservoirs or springs in the exclusive ownership of one person. (d) Water previously captured whether transmitted by ditch, channel or pipe. (e) Water diverted from intermittent streams. (f) Diffused surface water. (g) Water captured by instream pit reservoirs, dams constructed pursuant to a lawful permit, or low water weirs and water stored in federal impoundments. (h) Non-consumptive usage.[185]

One of these exclusions is drawn, in part, from the legislation which exempts from registration water diversions from natural lakes or ponds in the exclusive ownership of one person.[186] Thus, it would be difficult, if not impossible, for the Commission to make allocations to these users because they are not required to be registered. The rules permit usage without an allocation "from lakes, ponds, reservoirs or springs in the exclusive ownership of one person."[187] The registration exemption in the statute extends only to natural lakes or ponds and does not mention reservoirs or springs.[188] It is not clear

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[184] Id. § 307.2.

[185] Id.

[186] Ark. Code Ann. § 15-22-215(a).

[187] Rules § 307.2(c).

[188] Ark. Code Ann. § 15-22-215(a).

how man-made lakes or ponds fit, although some of these uses would, presumably, be included in other categories usable without allocation; for example, water captured in dams, previously captured, or diffused surface water.

"Water captured by instream pit reservoirs, dams constructed pursuant to a lawful permit, or low water weirs and water stored on federal impoundments" presents an interesting amalgamation of types of water usable without allocation.[189] Diversions from these forms of capture could, presumably, result in conflicts between riparians users. It would appear that these rules would reward some riparians at the expense of others. However, this "exclusion" from the allocation procedures must be read in light of the dam construction permit legislation.[190] This legislation requires a permit to impound water for any purpose.[191] One of the conditions required before a dam permit can be issued is that it not affect downstream riparians or instream flow requirements.[192]

Dams constructed under the permit statute must be constructed to impound only "surplus" surface water. In addition they must provide for discharge each day of a quantity to be fixed by the Commission which will preserve "from time to time, below the dam, the flow of any stream involved at a rate designed

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[189] Rules § 307.2(g).

[190] Ark. Code Ann. §§ 15-22-210 to 214.

[191] Ark. Code Ann. § 15-22-210.

[192] Ark. Code Ann. § 15-22-210(1).

to protect the rights of any lower riparian owner, and the fish and wildlife dependent thereon."[193] Dams must also be constructed so as to impound water only on land owned or occupied by the applicant.[194] Permits are not required for a dam which impounds less than fifty acre feet of water or is of a height less than twenty-five feet.[195] The legislation also excludes dams "the height of which is at or below the ordinary high water mark on the stream."[196] Further, the original legislation gave an exclusive right to the person constructing the dam to take water from the reservoir created, subject to the obligation to discharge water as specified in the permit.[197]

The rules also allow water stored in federal impoundments to be used without allocation.[198] This exclusion is consistent with the 1957 legislation which granted a right to acquire absolute "title to and use for any purpose" of water stored in any federal impoundment.[199] Certain conditions are specified but, for the most part, notice to the Commission of any contract with the

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[193] Id.

[194] Ark. Code Ann. § 15-22-210(3).

[195] Ark. Code Ann. § 15-22-214(a) (as amended by 1989 Ark. Acts. 685).

[196] Ark. Code Ann. § 15-22-214(b).

[197] Ark. Code Ann. § 15-22-216.

[198] Rules § 307.2(g).

[199] Ark. Code Ann. § 15-22-218(a).

federal government is the only real requirement.[200] The legislation recognizes the lesser position of the state by granting the right "to the full extent that the State of Arkansas can grant that right."[201] Federal impoundments, it seems, can be the subject of state regulation only to the extent that the federal government would yield to state authority.[202] Furthermore, while the federal government has left allocation of water to state law, it applies only after federal needs have been preserved.[203]

The rules, however, go beyond permitted dams and federal impoundments and grant a superior position to those taking water from streams where the water is captured by "instream pit reservoirs" and "low water weirs."[204] These types of water capture can be constructed without a permit for dam construction. Although the rules for allocation allow use of such water without allocation, these uses could be construed as an interference with other riparian owners' rights to receive an equitable share of the water in a given stream. In a recent chancery court case involving a low water weir, the court ordered the person who had constructed the weir to either lower it or cut through it to

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[200] Ark. Code Ann. § 15-22-218(b).

[201] Ark. Code Ann. § 15-22-218(a).

[202] See supra notes 170-176 and accompanying text.

[203] See Trelease, Federal State Relations in Water Law, National Water Commission Legal Study No. 5, 147 (1971).

[204] Rules § 307.2(g).

allow a reasonable share of the water to move downstream. The Commission declined to exert authority in that case under allocation rules similar to the present ones.[205]

Another interesting exclusion from the allocation rules is the taking of water from "intermittent streams."[206] "Intermittent streams" are defined in the rules as those "whose flow is seasonal in nature and does not flow continuously."[207] Perhaps, the logic of excluding these streams from the allocation rules entirely is that they may not even be considered "watercourses" under the riparian doctrine. As a result, owners of land along these "streams" would not be prohibited from taking water from them under the riparian rights system. In addition, because such streams would contain flow only during seasons in which shortages were unlikely, the allocation procedure would never come into play.

The rules allow unallocated use of diffused surface water, water previously captured, and water captured by tailwater recovery systems.[208] None of these uses would require registration because they do not involve water diverted from

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[205] Arkansas Land & Cattle Co. v. Pickens, No. CH-85-74-2(AC), slip. op. (Chicot County Ark. Ch. Ct. July 20, 1985).

[206] Rules § 307.2(e).

[207] Id. § 301.3(u). A notation is added that it is the "intent of the Commission to define intermittent streams by a statistical method once sufficient stream flow data is available at the conclusion of the 'Low flow characteristics of Arkansas streams study.'" Id.

[208] Id. § 301.2(f), (d), (b).

streams. Interestingly, the definition of "diffused surface water" in the rules differs from the definition found in the legislation. According to the legislation relating to allocations and dam construction, "diffused surface water" is that "occurring naturally on the surface of the ground other than in natural channels, lakes, or ponds."[209] The rules extend this definition to include water on the surface of the ground "other than in natural or altered stream channels, lakes or ponds."[210] Under either definition the clear intent is to exclude water that is not in streams from the allocation rules. In both the legislation and the rules, the definition of "stream" excludes a "depression, swale, or gully, through which diffused water flows."[211] The exclusion of diffused surface water from other allocation rules is consistent with its exemption from registration requirements.[212]

By excluding water previously captured and water captured by tailwater recovery systems from allocation,[213] the rules recognize that diverters should be encouraged to conserve water by arranging for its capture in times when adequate supplies exist and, when possible, by re-using water in those irrigation systems that can accommodate recovery and reuse.

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[209] Ark. Code Ann. § 15-22-202(5).

[210] Rules § 301.3(m) (emphasis added).

[211] Ark. Code Ann. § 15-22-202(2); Rules, § 301.3(jj).

[212] Rules § 302.2(c).

[213] Id. § 307.2(b), (d).

The rules also allow diversions of less than 325,900 gallons (one acre-foot) of water in any water year to be made without allocation.[214] This is consistent with the exemption from registration of these diversions.[215] However, the registration legislation contains no such exemption.[216]

4. Procedure for Allocation

The procedure for allocation may be instituted by any person affected by the shortage or by the Commission on its own initiative.[217] The rules outline a detailed notification procedure[218] which complies with the statutory requirement of "notice and hearing."[219] Once it has been established, after proper notice and a hearing, that the allocation is appropriate, the amount to be allocated is expressed as a percentage of available water on a daily basis under varying levels of flow.[220] A streamflow staff gauge may be used at the point of diversion to indicate permissible levels including an indication of the minimum streamflow below which diversions may not continue

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[214] Id. § 307.2(a).

[215] Id. § 302.2(a).

[216] Ark. Code Ann. § 15-22-215(a) exempts from the registration requirements only diversions from natural lakes or ponds in the exclusive ownership of one person.

[217] Rules §§ 308.1 to 310.1.

[218] Id. §§ 308.1 to 309.8.

[219] Ark. Code Ann. § 15-22-217(a).

[220] Rules § 311.1.

except for domestic or municipal-domestic use.[221] In cases of emergency the Commission may shorten the time frame for determination of allocation and may modify predetermined allocations for nonriparian transfers to minimize the effects on public health, safety, or welfare.[222]

The ASWCC included in the rules a provision for a "predetermined allocation plan." The purpose is to determine, in advance, what allocations should be made if a water shortage occurs so that allocations could be implemented immediately. This is apparently intended to be developed on a trial basis in one watershed.[223] The development of such a program for the White River is the selected study area.

Agency administered allocation systems for water have the potential of resolving conflicts in a timely and cost-effective manner. However, agency decisionmaking mechanisms must offer requisite constitutional safeguards, such as due process, and ultimately an appeals process is necessary in order to subject agency decisions to judicial review. This right is recognized in the rules where the agency appeals process is incorporated by reference.[224] The allocation legislation specifies that any person affected by rule, regulation, or order may obtain review in circuit court of the record that was made in the hearing.

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[221] Id § 311.1, .4, .5.

[222] Id. §§ 311.1, 313.2.

[223] Rules § 304.14, 305.18.

[224] Id. § 309.8.

Question 3. Existing legislation has defined excess flow on an annual basis. Is there any legislation that defines excess flow for nonriparian use? Does excess flow for nonriparian use always exist when the flow is above the minimum flow set by the state?

The 1985 Act mandated that the Soil and Water Conservation Commission do the following: Complete an inventory of water needs in the state, define critical water areas, define the term "excess surface water," establish minimum streamflows, indicate where excess surface water areas exist, and develop guidelines for the evaluation of any proposed transfers of water.[225] The legislation authorized the Commission to allow the transportation of excess surface water to nonriparian land (intrabasin or interbasin) in cases where a determination is made that excess surface water exists.[226] For purposes of this legislation "excess surface water" means twenty-five percent of that amount of water available on an average annual basis from any watershed above the amount necessary to satisfy the following: (1) Existing riparian rights as of June 28, 1985; (2) water needs of federal water projects existing on June 28, 1985; (3) the firm yield of all reservoirs in existence on June 28, 1985; (4) maintenance of instream flows for fish and wildlife, water quality, and aquifer recharge requirements; and (5) future water needs of the basin of origin as projected in the State Water Plan developed pursuant to

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[225] Ark. Code Ann. § 15-22-301.

[226] Ark. Code Ann. § 15-22-304.

Act §§ 15-20-207 and 15-22-501 et seq.[227] In addition, the legislation places restrictions on the transportation and use of water outside the state by requiring a study by the Soil and Water Conservation Commission and a recommendation to the General Assembly as to whether the transfer would be in the public interest. The General Assembly's approval and an interstate compact is required in order to carry out such transfers.[228]

Following the adoption of the legislation in 1985 the Commission has developed new rules for the utilization of excess surface water. In the process, the Commission developed rules that would incorporate the rules for allocation of surface water during periods of shortage with the overall surface water diversion and transfer authorization rules.

Under these rules, a nonriparian owner may divert excess surface water to nonriparian land upon approval of the Commission if the water will be applied to reasonable and beneficial use and if the diversion will cause no significant adverse environmental impact.[229] When the transfer is interbasin the Commission also must take into account the protection of the watershed of the basin of origin and to insure against an adverse impact of the transfer on other lawful water users.[230] Surface water transfer

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[227] Ark. Code Ann. § 15-22-304(b).

[228] Ark. Code Ann. § 15-22-303.

[229] Rules § 304.2–304.16 (intrabasin); 305.1–305.20 (interbasin).

[230] Id. § 305.6

permits may be issued for a fixed period of up to fifty years.[231] The permit may be canceled if the water is used for purposes other than that stated in the permit or if more water than authorized is diverted.[232] The applicant may be given up to two years form the date of the issuance of the permit to develop the ability to make the water transfer.[233] When the use is to be for irrigation the permits are considered to run with the land and can be assigned only to a subsequent owner or lessee of the land and may not be sold separate and apart from the land itself.[234]

As a part of the Arkansas Water Plan the Commission has calculated "excess surface water" for each of the five major basins of the state. In doing so, the agency projected existing riparian uses, along with instream flow requirements for fish and wildlife, and navigation to the year 2030. These needs were subtracted from the average annual flow and the mandated twenty-five percent figure was used to calculate the "excess." Using that procedure, the Ouachita Basin has some 725,000 acre feet per year of excess water; the Red River Basin 1,100,000 acre feet; the White River Basin 1,700,000 acre feet; the Arkansas River Basin 2,700,000 acre feet; and the Delta Basin 4,100,000 acre

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[231] Id. § 304.7, 305.10.

[232] Id. § 304.11; 305.15.

[233] Id. § 304.12, 305.16.

[234] Id. § 304.13, 305.17.

feet.[235]

The Commission also designated certain areas of the state as "critical surface water areas" -- those which presently have serious surface water supply problems. These problems are the result of off-stream water withdrawals, water quality degradation, or water management constraints.[236]

Designation of excess surface water and critical surface water areas is the first step in implementing a system to permit transfers of water to nonriparian land. The rules of the agency detail the procedures for authorizing either an intrabasin or interbasin transfer and, for that matter, an interstate transfer.

Question 4. When stages on the White River reach a determined level (minimum flow requirement) will agricultural irrigation, navigation, fish and wildlife, and water quality interests compete on an equal basis and share the pain?

The most controversial part of the Commission's authority surrounds its mandate to establish minimum streamflows. In its rules the Commission has defined "minimum stream flow" to be: "The quantity of water required to meet the largest of the following in-stream needs as determined on a case by case basis: (1) aquifer recharge, (2) fish and wildlife, (3) interstate

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[235] Arkansas Water Plan at 25.

[236] Id. at 20-21. This includes a portion of the Project Area within the Delta Basin.

compacts, (4) navigation, and (5) water quality."[237]

The 1985 legislation, as amended in 1989, specifically provided that the Soil and Water Conservation Commission is to "establish and enforce minimum stream flows."[238] In making determinations of whether excess surface water is available to be transferred to nonriparians the Commission is to consider "[m]aintenance of in-stream flows for fish and wildlife, water quality and aquifer recharge requirements. . . ."[239] In establishing minimum streamflows the Commission is to notify the Arkansas Game and Fish Commission, the Arkansas Pollution Control and Ecology Commission and "any other interested state boards and commissions" prior to the establishment of minimum streamflows.[240] Both the Game and Fish Commission and the Pollution Control and Ecology Commission must file written comments. The agency is to follow procedures for rulemaking, including notice and public hearings.[241]

The 1989 legislation added "navigation" and "interstate compacts" to the list of instream uses considered part of the definition of "minimum stream flow."[242] Although this amendment changes the definition section of the allocation statute, the

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[237] Rules § 301.3(W).

[238] Ark. Code Ann. § 15-22-222.

[239] Id. § 15-22-304(b)(4).

[240] Id. § 15-22-222(b)(1).

[241] Id. § 15-22-222(b)(2), (c).

[242] Id. § 15-22-202(6).

addition must be intended to apply to all areas of water policy.

Further, the rules indicate that maintenance of minimum streamflows for the major river basins is included in determining what constitutes excess surface water.[243] In the Arkansas Water Plan, the Commission indicates that because of significant differences between streams in the different ecoregions, the same procedures for determining instream flow requirements would not be applicable to all streams. Likewise, a given percentage of flow would not be appropriate for all streams.[244]

The designated minimum streamflow levels in the Arkansas Water Plan come from recommendations of agency staff from the Department of Parks and Tourism, Game and Fish Commission, and the Department of Pollution Control and Ecology. These agencies were particularly concerned that the Arkansas Water Plan should recognize and protect instream uses before withdrawals for offstream uses occur. The Commission adopted the recommended levels to determine whether excess surface water exists for purposes of nonriparian transfers.

The allocation rules classify instream uses ("minimum stream flow") as a reserved use, along with domestic and municipal-domestic uses and federal water rights, prior to allocations for other uses and needs.[245] This would appear to meet the objectives

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[243] Id. § 301.3(R).

[244] Arkansas Water Plan at 17. Fish and wildlife requirements were computed using 60% of mean monthly flow for November through March; 70% for April through June and 50% for July through October.

[245] Rules § 307.4.

of the concerned agencies to protect those minimum levels before any allocation occurs. However, the utilization rules make no effort to develop specific minimum instream flow levels.[246] These will apparently be developed on a case by case, site specific, basis as indicated in the Arkansas Water Plan.

The importance of the establishment of minimum streamflows on the White River to agricultural irrigation interests comes about in two ways. First, minimum streamflow maintenance is one element that must be considered in determining whether excess surface water is available for the purpose of nonriparian transfer. Second, minimum streamflow uses are considered a "reserved use" which must be recognized before allocations are made during a period of shortage.

Under the ASWCC authority to permit the transfer of excess surface water to nonriparians, only 25% of the excess on an average annual basis may be available for transfer.[247] Flows for fish and wildlife, water quality, aquifer recharge, navigation and interstate compacts must be taken into account.[248] While the apparent intent was to deal with interbasin transfers in making this determination, the legislation refers to transfers from "any watershed" and both the interbasin transfer rules and the intrabasin transfer rules refer to minimum streamflow

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[246] Rules "Subtitle III Minimum Stream Flow [Reserved]".

[247] Ark. Code Ann. § 15-22-304.

[248] Ark. Code Ann. § 15-22-304(4); Rules § 301.3(R).

monitoring.[249]

Under the monitoring procedure a staff gauge is to be placed in the stream at the point of diversion. While the water level is in a "green zone," the normal diversion lend, riparian and nonriparian permittees may divert water. When the water is at or below the "red zone," the minimum streamflow level, all diversions except those for domestic and municipal domestic uses are to cease.[250] An intermediate zone, the "yellow zone" or allocation level indicates a level in which water usable without allocation or water allocated under the allocation procedure may be diverted.[251]

This monitoring is to aid in coordinating the allocation of water during periods of shortage. Once the allocation procedure is implemented, either by petition by any person eligible to receive an allocation upon the Commission's own initiative, an allocation plan will be implemented by Commission orders to the affected persons.[252]

The allocation plan will express each individual allocation as a percentage of available water under varying levels of flow on a daily basis. Each diverter will be assigned an allocation based on allowable daily pumping expressed both as a percentage

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[249] Ark. Code Ann. § 15-22-304; Rules § 304.15, 305.19.

[250] Rules § 304.15.

[251] Id. The rules also refer to another category, ambiguously called "water lawfully diverted that has not yet become subjected to reduction by allocation" as available during this stage.

[252] Rules § 309.6.

and as a quantitative measure with appropriate reference to the staff gauge reading.[253] If minimum daily pumping allocations are not exceeded, no restrictions apply to the time or rate of pumping.[254]

The allocation rules place agriculture in the highest "priority of water use" category, above industry, hydropower and recreation. Nonriparian intrabasin transfers are subordinate to riparian diversions but have a higher preference than nonriparian interbasin transfers. Out-of-state transfers are last in the order of preference. All such uses are subject to reserved uses, and uses and water usable without allocation.[255] While it is the apparent intent of the Commission to make allocations within categories (e.g., nonriparian intrabasin transfers) on a "first in time, first in right" basis, this is not stated explicitly in the rules.

Question 5. What is the financial and legal capability of the White River Regional Irrigation Water Distribution District (WRRIWDD)?

a) Existing

b) Required to sponsor project: WRRIWDD proposes to finance the project and its operation and maintenance through the sale of water or the levying of a tax for assessed benefits.

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[253] Rules § 311.1.

[254] Rules § 311.7.

[255] Rules § 307.4.

c) What procedures are required to empower WRRIWDD to take and sell water from the White River?

5a) Existing Capacity

Special governmental districts have been utilized for a variety of public purposes for over 100 years. Their use has proliferated, particularly as a means of supplying water for both urban and agricultural uses. Improvement districts have been among the most common such entities in Arkansas as a means of providing basic services to citizens. These districts flourished in the late 19th century in part due to limitations placed on county and local governments in the 1874 Arkansas Constitution (prior to the adoption of Amendment 55). The districts, described as "quasi-governmental" of special or limited powers. One of the earliest uses of the concept for water supply purposes was California's Wright Act, adopted in 1887, which provided for the formation of special water districts with the authority to issue bonds and to include a compulsory property assessment against property in the district which benefited, directly or indirectly, from the function of the district.

This Act was challenged on constitutional grounds in Fallbrook Irrigation Dist. v. Bradley.[256] The challenge was focused on the compulsory taxation feature of the district. In upholding the legislation in all respects the U.S. Supreme Court deferred to state legislatures in determining that such districts

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[256] 164 U.S. 112, 17 S. Ct. 56 (1896).

benefited the agricultural economy and, thus, the public generally. (The Wright Act allowed assessment against town lots which received no water but benefited indirectly by the development of agricultural irrigation.) The court stated:

> To irrigate and thus bring into possible cultivation these large masses otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the State. The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use.[257]

The use of irrigation districts was further encouraged by federal reclamation law. In a period of 20 years special districts became the primary contracting entity between farmers and the federal government. In 1926 special water districts were recognized as the exclusive method of participation in federal reclamation projects.[258] The concept of contracting with such special districts as a means of supplying water was carried forward in the federal Watershed Protection and Flood Prevention Act[259] which became the impetus for Arkansas to adopt two versions of special districts -- those authorized by Act 329 of 1949, the Arkansas Irrigation, Drainage and Watershed Improvement District Act[260] and those in Act 114 of 1957, the Regional Water

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[257] 17 S. Ct. at 64.

[258] Comment, "Desert Survival: The Evolving Western Irrigation District," 1982 Ariz. St. L.J. 377.

[259] 16 U.S.C. § 1001-1007.

[260] Ark. Code Ann. § 14-117-101 to 427.

Distribution District Act.[261]

The nature of these types of districts was described by the Eighth Circuit in Drainage Dist. No. 2 v. Mercantile-Commerce Bank & Trust Co.[262] dealing with an Arkansas local improvement district:

> [In Arkansas], local improvement districts and their commissioners are governmental agencies created as quasi public corporations deriving their powers directly from the Legislature and exercising them as the agent of the property owners in the district whose interests are affected by the duties they perform. They exercise no governmental powers except those expressly or impliedly granted by the Legislature. They are not political or civil divisions of the state like counties and municipal corporations created to aid in the general administration of the government.[263]

The question was previously addressed by the Arkansas Supreme Court in Drainage District No. 7 of Poinsett County v. Hutchins.[264] In evaluating the nature of a drainage district the court emphasized that such districts have only such powers as are expressly or impliedly conferred on them by the statute authorizing their formation. They were called governmental agencies created as "quasi public corporations" which exercise their powers as agents of the property owners whose interests are affected by the duties performed by the district.

How do special water districts acquire water for distribution? This question has been addressed by a variety of

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[261] Ark. Code Ann. § 14-116-101 to 406.

[262] 184 Ark. 521, 42 S.W.2d 996 (1931).

[263] 184 Ark. at 530.

[264] 235 Ark. 513, 360 S.W.2d 750 (1962).

approaches. Some states provide that districts may hold formal title to water rights with the users holding only an equitable interest in the water itself. Others deem the landowners to hold the actual rights with the districts designed to deliver the water while holding title to the diversion and distribution facilities. Some give the districts considerable power to allocate and distribute water. The important consideration is the purpose for which the legislation permits formation and operation of the district and the powers granted by the basic legislation.[265]

As a public nonprofit regional water distribution district the WRRIWDD is authorized to fulfill broad purposes under the Act. These purposes include the acquisition of water not only from reservoirs created by dams constructed "by or under the direction" of the U.S. Army Corps of Engineers but also from wells, lakes, rivers, tributaries, or streams of or bordering the state.[266] Acquisition of water, water storage facilities and storage of water is also authorized in either projects of the U.S. Army Corps of Engineers or by the water district itself with financing from the USDA under the Watershed Protection and Flood Prevention Act "or other federal law."[267] In addition, the district may be involved in purification, treatment and processing of water, in furnishing water to persons desiring it,

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[265] 1982 Ariz. State L.J. at 409-410.

[266] Ark. Code Ann. § 14-116-102(1).

[267] Ark. Code Ann. § 14-116-102(2).

in installation and operation of transportation facilities and in the transportation and delivery of water itself.[268] In Lyon v. White River Grand Prairie Irrigation District[269] the Arkansas Supreme Court interpreted the purposes section of the district legislation to include the establishment of such districts for agricultural or other purposes as well. The furnishing of irrigation water is clearly contemplated by the legislation, according to the court. In fact, the court order creating WRRIWDD includes specific reference to irrigation water and the name of the district was changed, upon recommendation of the ASWCC to reflect the irrigation purpose.[270] The "powers" section of the Act is quite broad and was amended in 1989 to strengthen the authority of a district to carry out the purposes for which it was formed.[271] Among the powers important in carrying out the water distribution function are those allowing such districts:

(1) to acquire absolute title to water from reservoirs or other water sources created by or under the direction of the U.S. Army Corps of Engineers or by the district with financial assistance of the USDA and to use this water for any purpose;

(2) to acquire water storage and withdrawal rights in the

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[268] Ark. Code Ann. § 14-116-102(3)-(6).

[269] 281 Ark. 286, 664 S.W.2d 441 (1984).

[270] See, "Report of the Arkansas Soil and Water Conservation Commission" (June 11, 1984), In the Matter of the Establishment of the White River – Grand Prairie Irrigation District, Circuit Court of Arkansas County, Civil No. 80-63.

[271] Ark. Code Ann. § 14-116-402.

same manner;

(3) to transport, distribute, sell, furnish, and dispose of the water from whatever source desired to any person at any place;

(4) to regulate, define and control the rate and location of any withdrawal or transfer of water, in natural or manmade channels, which is "owned, acquired, or developed by the district;"

(5) to construct, erect, purchase, lease as lessee and in any manner acquire, own, hold, maintain, operate, sell, dispose of, lease as lessor, exchange and mortgage any facilities (and "property rights") as "necessary, convenient, or useful."[272]

The district also has broad powers to assist customers in preparation of their premises for the use of water; and to deal with both real and personal property including easements and rights-of-way.[273]

In addition, in connection with the acquisition, construction, improvement, operation, or maintenance of its transportation and distribution facilities, the district is authorized to use the bed of any stream, "without adversely affecting existing riparian rights." This right also extends to public property such as highways, rights-of-way or easements and tax-forfeited land.[274]

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[272] Ark. Code Ann. § 14-116-402(3) and (4).

[273] Ark. Code Ann. § 14-116-402(4), (5) and (6).

[274] Ark. Code Ann. § 14-116-402(9).

5b) Required to sponsor project:

The WRRIWDD was established pursuant to Act 114 of 1957, the "Regional Water Distribution District Act."[275] It was anticipated that such districts would be organized and created to contract with the United States to make use of water supply from multipurpose reservoirs constructed by the Corps of Engineers.[276] These districts were empowered to acquire title to water in such reservoirs or other water sources created by the construction of multipurpose dams: to "transport, distribute, sell, furnish, and dispose" of this water to any person at any place.[277]

Since the primary purpose was water distribution, it was anticipated that the districts would generate revenues from "rates, fees, rents or other charges" for water and services of the district.[278]

These districts, unlike those authorized by the "Arkansas Irrigation, Drainage and Watershed Improvement District Act of 1949" Act 329 of 1949,[279] were given no authority to levy assessments on the basis of benefits derived by lands within the district nor to levy taxes on the amount of the assessment of benefits thereon. The only authorized source of revenue appears

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[275] Ark. Code Ann. § 14-116-101 to 406.

[276] Ark. Code Ann. § 14-116-102.

[277] Ark. Code Ann. § 14-116-402(3).

[278] Ark. Code Ann. § 14-116-402(13) and 14-116-404.

[279] Ark. Code Ann. § 14-117-101 to 427.

to be from the sale and distribution of water.

5c) Procedures to take and sell water from the White River

As discussed in Questions 2 and 3 the ASWCC may authorize the intrabasin transfer of excess surface water to nonriparians through a permit procedure developed by the ASWCC. One of the major changes in Arkansas law in the 1985 legislation was to provide for nonriparian use of water by granting the ASWCC the power to authorize the transportation of excess surface water to nonriparians for their use.[280] The Commission has adopted detailed regulations to carry out this authority including separate procedures for interbasin and intrabasin transfer of water. The current proposal for transfer of water from the White River to the project area is within the designated Delta Basin. Therefore the rules relating to intrabasin transfer are applicable.[281] A "person" shall be authorized to divert excess surface water for nonriparian use.[282] Under these rules a "person" is defined to include not only natural persons but "partnerships, firms, associations, cooperative, municipality, county, public or private corporation, and any federal, state or local governmental agency."[283] Thus, the WRRIWDD qualifies as a "person" for this purpose. The permit application requires

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[280] Ark. Code Ann. § 15-22-304(a).

[281] Rules § 304.1 to 304.16.

[282] Rules § 304.1.

[283] Rules § 301.3DD.

detailed information on the proposed transfer including the following:

1. The quantity of water to be diverted for direct use.
2. The quantity of water to be stored away from the point of diversion.
3. The total amount of water to be diverted.
4. The proposed time or times of diversion.
5. The purpose for which the water is to be diverted.
6. The location of the land on which the water is to be used.
7. The proposed conservation plan.
8. If for irrigation:
   (a) The area and legal description of the lands irrigated.
   (b) The types of crops to be cultivated under irrigation during the water year.
9. Any other reasonable information requested by the Director.[284]

The permit, when issued, will include the amount of water permitted, the authorized use, the point of approved diversion, the legal description of the land of intended use and approved of the conservation plan.[285] The period is fixed by the Director based on consideration of the investment by the permittee and the period usually required to amortize the investment not to exceed 50 years.[286] And, the permit "runs with the land" and cannot be sold separate from the land described in the permit and "can only be assigned to a subsequent owner or lessee of the land."[287]

It must be noted that this permit procedure refers to the

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[284] Rules § 304.3.

[285] Rules § 304.5.

[286] Rules § 304.7.

[287] Rules § 304.13.

use of water, not the acquisition of title to the water itself. Neither the legislation nor the ASWCC rules contemplate that a permittee is to become the owner of the water. However, given the broad authority outlined in the district's "powers" section, it would appear that the district would have to comply with the permit procedure to obtain the right to transfer the water but that the authority of the district to acquire absolute title to water from federally financed projects would take precedence over any questions related to ownership. This is suggested by language in the 1957 Act which states explicitly that:

> This chapter is complete in itself and shall be controlling. The provisions of any other law of this state, except as provided in this chapter, shall not apply to a water district organized under this chapter.[288]

The legislative intent seems to be clear. The provisions of the distribution district act would control. However, it would be desirable to have the ASWCC rules amended to reflect the special authority of such a district with regard to water which is to be acquired or withdrawn from a water source like the White River and then transferred for use at other locations.

These rules, read in conjunction with the powers of a Distribution District, raise the question of whether a district requesting a permit may actually become the owner of the water from sources other than from federally financed impoundments. Act 114 suggests that such districts may obtain water not only from reservoirs but other water sources as well. However, if the

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[288] Ark. Code Ann. § 14-116-104.

from sources other than from federally financed impoundments. Act 114 suggests that such districts may obtain water not only from reservoirs but other water sources as well. However, if the water is to be transferred to nonriparian land and is obtained through the permitting process outlined above, it would appear that it is not "owned" by the District but only that its use on such land is authorized for the permit period. While it is not specifically addressed in the rules, the district would be allowed to impose rates and charges for the distribution of the water to the lands described in the permit even if it is not owned as such.

An alternative approach, utilized in Western states under the appropriation doctrine where rights are more absolute, is to allow individual holders of rights to apply for the permits to transfer water then contract with the Water Distribution Districts for the distribution service.

Question 6. Can the WRRIWDD obtain the authority to regulate groundwater use within the project boundaries?

The water legislation designates the ASWCC as the agency with authority to conduct any groundwater regulatory program. However, the purpose statement indicates that should regulatory provisions be implemented in the future the ASWCC should make "every effort" to delegate water management powers to qualified local districts and that it is desirable that day-to-day water

management be administered by local district.[289] "Local districts" are defined to include either a conservation district or a regional water district"[290] which is, in turn, defined to mean a regional water distribution district created under the Regional Water Distribution Act.[291] In the "powers" section, the ASWCC is authorized to delegate any of its powers to a district within a critical groundwater area and is to provide technical assistance and establish guidelines which "shall be followed" by districts granted powers under the Act.[292] In addition, the ASWCC is to "resolve disputes between, approve regulations of, and hear appeals from decisions of districts to which the commission has delegated powers." Obviously, such delegation of authority may occur only after the ASWCC has gone through the territorial procedure outlined in Question 1 regarding both the designation of critical areas and the implementation of a regulatory program.[293]

As outlined in Question 1 the issue of just what may be included in a regulatory program, once developed, is not clearly outlined in the legislation. Mention is made of "well spacing," "issuance of groundwater rights" and "groundwater classification and aquifer use" but little guidance is provided as to what may

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[289] Ark. Code Ann. § 15-22-902.

[290] Ark. Code Ann. § 15-22-903(7).

[291] Ark. Code Ann. § 15-22-903(11).

[292] Ark. Code Ann. § 15-22-904(8)&(9).

[293] Ark. Code Ann. § 15-22-904(10).

be included in a regulatory program.[294]

This lack of detail may be contrasted with that provided by states with more advanced groundwater protection programs. Kansas, for example, provides for the establishment of Groundwater Management Districts which are designed to "establish the right of local water users to determine their destiny with respect to the use of groundwater.[295] Such districts may petition for designation of specifically defined land as an "intensive groundwater use control area."[296] If it is so designated corrective control measures may be implemented which may include one or more of the following:

> (1) A provision closing the intensive groundwater use control area to any further appropriation of groundwater . . .' (2) a provision determining the permissible total withdrawal of groundwater in the intensive groundwater use control area each day, month or year, and, insofar as may be reasonably done, the chief engineer shall apportion such permissible total withdrawal among the valid groundwater right holders . . . ; (3) a provision reducing the permissible withdrawal of groundwater by any one or more appropriations thereof, or by wells in the intensive groundwater use control area; (4) a provision requiring and specifying a system of rotation of groundwater use in the intensive groundwater use control area; (5) any one or more other provisions making such additional requirements as are necessary to protect the public interest.[297]

Similar provisions in Nebraska allow the designation of a "control area" and if so designated a natural resource district (a local entity) may adopt one or more controls on groundwater

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[294] Ark. Code Ann. § 15-22-904(1).

[295] Kan. Stat. Ann. § 82a-1020.

[296] Kan. Stat. Ann. § 82a-1036.

[297] Kan. Stat. Ann. § 82a-1037.

use.[298] Even in areas that are not "control areas" but are established as "management areas," the district is authorized to manage the use of water for water quantity or quality purposes by the following:

(1) allocating the total permissible withdrawal of groundwater;
(2) Rotation of use of groundwater;
(3) Well-spacing requirements . . .;
(4) Reduction of irrigated acres;
(5) Requiring the use of flow meters on water wells;
(6) Best management practices;
(7) Requiring the analysis of water or deep soils for fertilizer and chemical content;
(8) Education programs designed to protect water quality.[299]

Question 7. Can the WRRIWDD obtain the authority to regulate flow levels and pool levels in natural streams? Would the WRRIWDD need to obtain flowage easements?

The 1985 legislation specifically required the ASWCC to establish minimum streamflows.[300] In 1989 additional statutory references to this authority was enacted by requiring the Commission to "establish and enforce minimum stream flows for the protection of instream water needs."[301] By definition "minimum stream flow" was the "quantity of water required to meet the largest of the following instream flow needs as determined on a case-by-case basis:

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[298] Rev. Stat. Neb. § 46-658, § 46-666.

[299] Rev. Stat. Neb. § 46-673.09.

[300] Ark. Code Ann. § 15-22-301(4).

[301] Ark. Code Ann. § 15-22-222.

(A) Interstate Compacts;

(B) Navigation;

(C) Fish and Wildlife;

(D) Water quality;

(E) Aquifer recharge."[302]

This definition is carried forward to the Commission rules for utilization of surface water.[303] However, the Commission has reserved the decision of establishing minimum streamflows for particular streams for the future and these are not included in the present rules.

The Arkansas Water Plan indicates that instream flow requirements must be established on a site specific flow basis. Because of differences between streams in different ecoregions of the state the plan indicates that a "given procedure or percentage" is not applicable to determining minimum streamflows on all streams. The plan recognizes the need to reserve some of the streamflow "to maintain fish and wildlife habitat, water quality standards, and aesthetic qualities of the streams."[304]

The designated levels come from recommendations of agency staff from the Department of Parks and Tourism, Game and Fish Commission, and the Department of Pollution Control and Ecology. These agencies were particularly concerned that the Arkansas

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[302] Ark. Code Ann. § 15-22-202(6).

[303] Rules § 301.3W.

[304] Arkansas Water Plan at 16-17.

Water Plan should recognize and protect instream uses before withdrawals for offstream uses occur. The Commission used recommended levels for fish and wildlife instream requirements to determine whether excess surface water exists for purposes of nonriparian transfers. These were computed as 60% of mean monthly flow for November through March; 70% for April through June and 50% for July through October.[305]

The allocation rules include instream uses ("minimum stream flow") as a reserved use, along with domestic and municipal domestic uses and federal water rights, prior to allocations for other uses and needs.[306] This would appear to meet the objectives of the concerned agencies regarding the protection of those minimum levels before any allocation occurs. However, the utilization rules make no effort to develop specific minimum instream flow levels. These will apparently be developed on a case by case, site specific, basis as indicated in the Arkansas Water Plan.

No statutory authority exists for the Commission to delegate the establishment and enforcement of minimum streamflows. However, the ASWCC may delegate its allocation authority to conservation districts and regional water districts.[307] As outlined in Questions 2 and 4 this procedure involves considerable direction to users relating to flow levels,

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[305] Id.

[306] Rules § 307.3.

[307] Ark. Code Ann. § 15-22-221.

especially when the flow level is above the minimum instream flow level but below a level where it can be used without restriction. Thus, once the agency establishes minimum flows for a given stream, if the allocation authority has been delegated to a district, flow levels and pool levels could be regulated during times of shortage.

Question 8. Can the WRRIWDD levy a groundwater preservation fee (tax) on all land within the project area?

As mentioned in Question 5 regional water distribution districts have no power to impose taxes or assessments. Interestingly, the 1991 groundwater legislation authorizes the ASWCC to promulgate rules and regulations for "groundwater classification and aquifer use, well spacings, issuance of groundwater rights within critical groundwater areas, and assessment of fees."[308] The legislation requires the ASWCC to assess annual fees for withdrawal of groundwater (and surface water) payable at the time of water use reporting.[309] The ASWCC may delegate any and all powers to districts within critical groundwater areas. Conceivably this could include the authority to assess the annual withdrawal fee although "fees" referred to in the legislation were set at $10.00 per registered well (or per registered withdrawal point).[310] This fee level would not be

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[308] Ark. Code Ann. § 15-22-904(1).

[309] Ark. Code Ann. § 15-22-913(a).

[310] Ark. Code Ann. § 15-22-913(b).

sufficient to serve as a "preservation fee" and would require legislative amendment to increase.

Again, the experiences of other states is useful in this regard. For example, Groundwater Management Districts in Kansas are authorized to impose an "annual water user charge against every person who withdraws groundwater from within the boundaries of the district."[311] This charge is, by statute, not to exceed 60¢ per acre foot of groundwater.

Question 9. Does the WRRIWDD currently have the right of access to perform surveys, evaluations, and investigations within the project area?

Unlike the powers granted a district organized under the Arkansas Irrigation, Drainage and Watershed Improvement District Act of 1949," regional water districts apparently have no right of access. Even irrigation corporations (private) organized for the purpose of furnishing water to the public for irrigation is given the authority to enter land for the purposes of making "surveys and measurements" when it proposes to construct canals or other works to extend its lines to connect with water sources.[312]

The ASWCC has such powers under the groundwater act and these are delegable to districts within critical groundwater

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[311] Kan. Stat. Ann. § 82a-1030.

[312] Ark. Code Ann. § 18-15-1102. These companies have a right of eminent domain to secure property and rights-of-way for canals, drains and other works. Ark. Code Ann. § 18-15-1101, 1103.

areas for purposes of carrying out the groundwater act's purposes. Thus, if the ASWCC completed its two-tiered process of designating critical groundwater areas and, then, implemented a regulatory program and if the regulatory authority was delegated to WRRIWDD the authority for access would likewise be delegated. This is too speculative and more specific authority is desirable.

Question 10. Can the WRRIWDD obtain the authority to regulate withdrawal of surface water (existing and import), especially when there is a history of use? Who will own the water in the delivery system, specifically the diverted water and the water resulting from runoff?

If the WRRIWDD obtains the right to transfer a permitted amount of water to nonriparian land, through the permit process with ASWCC the District would have the authority to administer this water in accordance with the permit terms, that is, to distribute it to the identified land in the amounts permitted. This water would not be <u>owned</u> by the District but would be available for use. Thus, the District should be free to distribute the water and, thus, regulate the withdrawal (amount and rate) from the delivery system.

The powers of the District refer to its ability to use existing streams for distribution purposes. However, the existing water in streams, used as a part of the delivery system, would not be controlled by the District unless those withdrawals were covered by separate permits. Through the same permit

application process the ASWCC could authorize the District to divert this water as well if it was found to be "excess surface water" in a particular watershed. Any such authority would have to follow a Commission determination that "excess surface water" exists.[313] This procedure recognizes the possibility that riparian rights (as of June 28, 1985) would have to be taken into account in the determination. In addition, language dating to 1969, requires that in any "adjudication" of rights to divert water a nonriparian use of water cannot "supersede, subordinate, or otherwise take priority or precedence" over a riparian right to divert water.[314] Thus, where a riparian has established a history of use (through registration of the diversion as required since 1969)[315] this use would be entitled to recognition.

Under the Regional Water Distribution District Act, a water district may acquire "absolute title to and use for any purpose and at any place" water stored in a reservoir or other water source created by construction of a multipurpose dam by or under the direction of the U.S. Army Corps of Engineers or constructed by the water district with federal assistance under federal law.[316] Likewise, a water district may acquire "water storage and withdrawal rights" in these reservoirs and water sources.[317]

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[313] Ark. Code Ann. § 15-22-304.

[314] Ark. Code Ann. § 15-22-214(f).

[315] Ark. Code Ann. § 15-22-215.

[316] Ark. Code Ann. § 14-116-402(3)(A).

[317] Ark. Code Ann. § 14-116-402(3)(B).

And, a water district is authorized to "transport, distribute, sell, furnish, and dispose" of water "from whatever source derived."[318]

Furthermore, the powers section allows districts to "regulate, define and control" the rate and location of any withdrawal or transfer of water from water channels (natural or manmade) "owned, acquired or developed" by the district.[319] And, the Act permits the district to use the bed of any stream for the transportation and distribution of water. However, this can only be done if existing riparian rights are not adversely affected.[320]

Under this broad authority the district would have absolute control of water developed as a part of the project, assuming federal assistance. This would include control of withdrawal and transfer from project water sources "developed" by the district. However, it appears the legislature intended to continue to protect existing riparian rights (presumably those existing at any time).

Question 11. Can the WRRIWDD regulate both the amount and rate of withdrawal from the delivery system?

As to the District's authority to regulate withdrawals generally as opposed to the specific authority discussed in

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[318] Ark. Code Ann. § 14-116-402(3)(C).

[319] Ark. Code Ann. § 14-116-402(3)(E).

[320] Ark. Code Ann. § 14-116-402(9).

Question 10, the only statutory basis for such authority is through the Commission's allocation authority during shortages, which may be delegated to conservation districts and regional water districts.[321]

As discussed in detail in Question 2 the Soil and Water Conservation Commission has had the authority to make allocations of water during periods of shortage since 1957, prior to the early 1980s the Commission had not developed any rules for implementing this authority. Following litigation, rules were established for making allocations through a procedure involving Commission hearings and a procedure similar to an adjudication.

A 1989 amendment to the statute authorizing administrative allocation attempts to provide additional guidance to the Commission in making allocation decisions. The original allocation legislation provided that the Commission could, during periods of shortage, allocate the available water "among the uses of water affected by the shortage of water in a manner that each of these may obtain his fair share of the available water remaining in the stream . . . ." Because a variety of consumptive and non-consumptive uses might be involved, an effort was made in the original statute to indicate, by general categories, the order of preference: (1) sustaining life, (2) maintaining health, and (3) increasing wealth. The 1989 amendment attempts to establish priority for certain specific uses and amend the language of the statute to provide for

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[321] Ark. Code Ann. § 15-22-221.

allocation "among the uses" (instead of "among persons") and substitutes "equitable portion" for "fair share." Further, the amendment indicates that, prior to allocation, water for some needs is to be reserved. These include (1) domestic and municipal domestic, (2) minimum streamflow, and (3) federal water rights.

The Commission rules are more specific. Once the reserved uses are met, allocation by the Commission gives preference in the following order: (1) agriculture, (2) industry, (3) hydropower, and (4) recreation. Presumably, all of these uses are a subcategory of "increasing wealth" since the two higher statutory preferences ("sustaining life" and "maintaining health") are met by the reservation for domestic, municipal-domestic. and minimum streamflow purposes.

The Commission rules on allocation also attempt to establish a priority of diversions by granting riparian uses a higher priority than nonriparian uses. This is consistent with the 1969 amendment to the allocation legislation which grants the Commission authority to make allocations between uses. However, this amendment also specifically states in language referring to registration of diversions that the legislation does not operate "to allow nonriparian use of water to supersede, subordinate or otherwise take priority or precedence over a riparian right to divert water from a stream, lake or pond."[322] This language was not eliminated from the statute in 1985, in spite of the explicit

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[322] Ark. Code Ann. § 15-22-215(f).

recognition of nonriparian uses. As a result, the allocation rules continue to give riparian uses a higher priority than nonriparian uses.

It would appear that all riparian diversions would take priority during an allocation over all nonriparian diversions even if the nonriparian use was of a higher category in the "order of uses." For example, a riparian recreational use would apparently be of higher priority than a nonriparian agricultural use, even though "agriculture" is designated as first in the "order of uses."

The Commission is authorized to delegate this allocation authority to conservation districts and regional water districts.[323] The Commission is to establish "guidelines" which shall be followed by the districts. It is likely that any such delegation of authority and relevant guidelines would require regulations similar to those now outlined in the Commission's own rules. The Commission retains the authority to approve or disapprove regulations of districts to which the commission has delegated power.[324]

Question 12. If the WRRIWDD acquires the land adjacent to the new canals and existing streams to be utilized as part of the project, will there be any riparian rights?

Under the traditional riparian rights doctrine, any riparian

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[323] Ark. Code Ann. § 15-22-221.

[324] Ark. Code Ann. § 15-22-221(c).

rights adhering to land by virtue of location pass with the land upon a sale or transfer. Thus, any land acquired by WRRIWDD would carry riparian rights. These rights would, under the traditional view, allow use of water from the stream on the riparian land itself. Any transfers to nonriparian use would be subject to the more recent authority of ASWCC to permit such uses and subject to the "order of preferences" during an allocation procedure if shortages occur.

As to canals, the riparian rights doctrine is inapplicable to artificial structures so no riparian rights would attach to land adjacent to new canals by virtue of location.

Question 13. If Farmer A decides not to participate in the project, can he a) withdraw water (without payment) from the new project canals running through his property; b) continue to withdraw from natural streams (without payment) that are a part of the project; c) if the answer to b) is yes, how much can he withdraw without payment?

The question of exclusion of certain land from a Regional Water Distribution District was specifically addressed in the original legislation. An owner of land within the district boundaries may petition at any time (before or after the district is established) for exclusion of his property for agricultural irrigation water purposes if it can be shown that the land is adequately supplied by irrigation water from surface sources or other sources existing at the time the District is created "or at

any time thereafter."[325] In addition, the landowner would have to show the property is not and will not be benefited in the future by improvements of the district.[326] Thus, a landowner could argue that historical use of groundwater or of surface water (presumably properly registered with ASWCC) is sufficient to allow exclusion. The riparian right to surface water (previously used and registered) is entitled to recognition even during a surface water allocation proceeding and a historical use of groundwater (registered) is entitled to be "grandfathered" if a regulatory scheme is implemented.

The broad exclusion ability poses a major obstacle to the operation of a Regional Water Distribution District. By contrast the traditional general rule for improvement districts would allow mandatory inclusions of any land benefiting from the district. For example, a district organized under the Arkansas Irrigation, Drainage and Watershed Improvement District Act of 1949 may assess lands beyond the boundaries of the district to show that they will be benefited (or damaged) by the improvement and may petition for their inclusion. The District limits may be extended to embrace these lands if it is found that these lands will be benefited.[327] The only procedure for inclusion of additional lands in a water distribution district is by petition of landowners themselves. This petition is handled in the same

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[325] Ark. Code Ann. § 14-116-207.

[326] Id.

[327] Ark. Code Ann. § 14-117-209.

way as the original petition for formation of a water district.[328]

Question 14. The project will require a nonriparian permit to withdraw excess water from the White River. Will the transfer of water at various locations within the project to nonriparian users also require a permit?

One of the major changes in Arkansas law in the 1985 legislation was to provide for nonriparian use of water by granting the ASWCC the power to authorize the transportation of excess surface water to nonriparians for their use.[329] The Commission has adopted detailed regulations to carry out this authority including separate procedures for interbasin and intrabasin transfer of water. The current proposal for transfer of water from the White River to the project area is within the designated Delta Basin. Therefore the rules relating to intrabasin transfer are applicable.[330] A "person" shall be authorized to direct excess surface water for nonriparian use.[331] Under these rules a "person" is defined to include not only natural persons but "partnerships, firms, associations, cooperative, municipality, county, public or private corporation,

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[328] Ark. Code Ann. § 14-116-406.

[329] Ark. Code Ann. § 15-22-304(a).

[330] Rules § 304.1 to 304.16.

[331] Rules § 304.1.

and any federal, state or local governmental agency."[332] Thus, the WRRIWDD qualifies as a "person" for this purpose. The permit application requires detailed information on the proposed transfer as outlined in Question 5.

The permit, when issued, will include the amount of water permitted, the authorized use, the point of approved diversion, the legal description of the land of intended use and approved of the conservation plan.[333] The period is fixed by the Director based on consideration of the investment by the permittee and the period usually required to amortize the investment not to exceed 50 years.[334] And, the permit "runs with the land" and cannot be sold separate from the land described in the permit and "can only be assigned to a subsequent owner or lessee of the land."[335]

While it appears that the rules contemplate permit applications from organizations such as WRRIWDD, the rules do not precisely indicate how the water so permitted is to be administered. Presumably, if the quantity of water to be diverted, and the location of land on which it is to be used is identified both in the application and in the permit itself, no additional permit would be necessary to transfer water within the identified area. These restrictions would impose considerable difficulty in administration and it may be necessary to seek an

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[332] Rules § 301.3DD.

[333] Rules § 304.5.

[334] Rules § 304.7.

[335] Rules § 304.13.

amendment of ASWCC rules to clarify the process.

Question 15. The WRRIWDD plans to apply for a nonriparian permit to withdraw water from the White River in the near future. How long will the permit be considered valid if construction of the project is at least several years away?

The surface water rules of ASWCC address the question by specifying that a permit of period greater than three years may be canceled if the permittee fails to take "reasonable steps" to obtain the ability to utilize the water permitted within two (2) years from the date of issuance of the permit.[336] No indication is given as to what is intended by "reasonable steps" to utilize the water. Western states with highly developed distribution and water rights systems usually impose similar requirements. In these cases the steps necessary for preservation of the right usually involve some physical activities toward development of the resource such as surveying, planning, or initial construction. By analogy, similar efforts would seem reasonable under these rules.

Question 16. Can low level dams and gated structures be constructed in natural streams that are to be utilized as part of the project?

Arkansas has legislation dating to the late 1800s governing the erection of dams in streams. The legislation declares "dams,

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[336] Rules § 304.12.

stoppages and obstructions" not made according to law to be public nuisances.[337] A procedure is set out for approval of the erection of dams in nonnavigable streams where the landowner owns the land on both sides.[338] This procedure requires a petition in circuit court if the dam is likely to overflow lands of other persons.[339] A jury is to be impaneled to visit the site and to determine the amount of damage by "reason of inundation consequent upon the erection of the dam as proposed."[340] The jury is to also consider to what extent ordinary navigation and the passage of fish will be obstructed and whether the "health of the neighborhood" will be "materially endangered" by the erection of the dam.[341]

Furthermore, the jury is to determine if any proprietor's "dwelling" or "outhouses, curtilages, or gardens" or "orchard" will be overflowed by the dam.[342] If so, the court "shall not

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[337] Ark. Code Ann. § 18-15-703.

[338] Ark. Code Ann. § 18-15-704. Even owners with land on one side may use a procedure to obtain 1 acre of land across the stream for the dam or for "his mill or other machinery in connection with his dam." Ark. Code Ann. § 18-15-712. This procedure is clearly applicable to mills on streams whereas the general erection procedure is broader.

[339] Ark. Code Ann. § 18-15-706.

[340] Ark. Code Ann. § 18-15-706(b)(1).

[341] Ark. Code Ann. § 18-15-706(b)(3) and (4).

[342] Ark. Code Ann. § 18-15-706(b)(2).

permit the dam to be erected."[343] The court is to refuse permission if the health of the neighborhood will be "materially annoyed by the stagnation of the waters."[344] If the dam is authorized, it may be conditional on passage of fish and payment of all damages and valuations made and assessed by the jury.[345] While this procedure contemplates construction of milling equipment, the general provisions are broad enough that they might be applicable in other situations as well.

In 1957 the legislature granted ASWCC the authority to issue permits for dam construction within streams.[346] The original legislation only applied if the dam impounded 50 acre feet or more of water or was of a height of 15 feet or more. The permissible height was changed to 25 feet or more in 1989.[347] The construction permit is not required if the dam height is at or below the high water mark on any stream.[348] However, the 1989 amendment provided that upon petition by persons affected, and after notice and hearing, if the Commission determines that a dam otherwise exempt would pose a significant threat to life or property, a construction permit would be required.

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[343] Ark. Code Ann. § 18-15-708. Interestingly, this section also refers to overflow of "fields" as a basis for refusal although not mentioned as part of the jury inquest procedure.

[344] Id.

[345] Ark. Code Ann. § 18-15-709.

[346] Act 81 of 1957, Ark. Code Ann. § 15-22-210 to 214.

[347] Ark. Code Ann. § 15-22-214(a).

[348] Ark. Code Ann. § 15-22-214(b).

The importance of the requirement of a dam construction permit is that it can only be granted if specified conditions are met. First, it can only be constructed to impound "surplus surface waters" and operated in such a way as to discharge a quantity of water (as fixed by the Commission) necessary to preserve the flow below the dam to protect the rights of any lower riparian owner and fish and wildlife dependent on the flow. Further, the "lives and property" of persons downstream must be adequately protected so the dam must be constructed and maintained in such a way as to preserve the dam and reservoir for the permit period.[349] Second, the dam must be constructed or operated in such a way as to impound water only on land owned or occupied by the permit applicant or on a beds or streams owned by the state.[350]

Third, permits may be issued for a period necessary to permit amortization of reasonable indebtedness, if any, incurred in connection with construction of the dam but limited to 50 years. This period may be extended up to an additional 50 years, for good cause shown, in a proceeding held within 5 years of permit expiration.[351] Permits are issued only after proper application, payment of the fee, and after notice and public hearing (if requested).[352]

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[349] Ark. Code Ann. § 15-22-210(1).

[350] Ark. Code Ann. § 15-22-210(3).

[351] Ark. Code Ann. § 15-22-210(4).

[352] Ark. Code Ann. § 15-22-211, 212.

Permits may be canceled or modified (after notice and hearing) upon failure to maintain the dam adequately or to comply with conditions for dam operation.[353] Commission representatives have a right of entry to inspect work of construction and maintenance and operation.[354]

Since dams envisioned in the project area would not likely meet the height requirement for permits, this procedure would likely come into play only if the dams meet the impoundment limit or, if so determined by ASWCC pose a significant threat to life or property, the major restrictions on construction and operation would be those imposed by other legal rules. For example, any holder of a riparian right would be entitled to object if harmed by the impoundment of the water and the obstruction of flow. If the dam were constructed under ASWCC permit, this objection would be made first to the ASWCC.[355] However, if the dam was exempt from the permit requirements, the lower riparians could petition the ASWCC to exercise its allocation authority to allocate available water among users affected by the shortage.[356] However, if the lower riparian is affected, not by an actual shortage, but because of the obstruction and impoundment itself, presumably, an action in court for interference with the riparian right. However, the extent of Commission involvement in such

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[353] Ark. Code Ann. § 15-22-215.

[354] Ark. Code Ann. § 15-22-210(2).

[355] Styers v. Johnson, 19 Ark. App. 312, 720 S.W.2d 334 (1986).

[356] Ark. Code Ann. § 15-22-217.

conflicts is not entirely clear especially in light of the categories of water that are "usable without allocation" under Commission rules.[357]

"Water captured by instream pit reservoirs, dams constructed pursuant to a lawful permit, or low water weirs and water stored on federal impoundments" presents an interesting amalgamation of types of water usable without allocation. Diversions from these forms of capture could, presumably, result in conflicts between riparians users. It would appear that these rules would reward some riparians at the expense of others. However, this "exclusion" from the allocation procedures must be read in light of the dam construction permit legislation. This legislation requires a permit to impound water for any purpose. One of the conditions required before a dam permit can be issued is that it not affect downstream riparians or instream flow requirements.

Dams constructed under the permit statute must be constructed to impound only "surplus" water. In addition, they must provide for discharge each day of a quantity to be fixed by the Commission which will preserve "from time to time, below the dam, the flow of any stream involved at a rate designed to protect the rights of any lower riparian owner, and the fish and wildlife dependent thereon."[358] Dams must also be constructed so as to impound water only on land owned or occupied by the applicant. Permits are not required for a dam which impounds

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[357] Rules § 307.2.

[358] Ark. Code Ann. § 15-22-210(1).

less than fifty acre feet of water or is of a height less than twenty-five feet. The legislation also excludes dams "the height of which is at or below the ordinary high water mark on the stream."[359] Further, the original legislation gave an exclusive right to the person constructing the dam to take water from the reservoir created, subject to the obligation to discharge water as specified in the permit.

The rules, however, go beyond permitted dams and federal impoundments and grant a superior position to those taking water from streams where the water is captured by "instream pit reservoirs" and "low water weirs."[360] These types of water capture can be constructed without a permit for dam construction. Although the rules for allocation allow use of such water without allocation, these uses could be construed as an interference with other riparian owners' rights to receive an equitable share of the water in a given stream. In a recent chancery court case involving a low water weir, the court ordered the person who had constructed the weir to either lower it or cut through it to allow a reasonable share of the water to move downstream. The Commission declined to exert authority in that case under allocation rules similar to the present ones.[361]

As mentioned above the permit legislation allows impoundment

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[359] Ark. Code Ann. § 15-22-214(b).

[360] Rules § 307.4.

[361] Arkansas Land & Cattle Co. v. Pickens, No. CH-85-74-2(AC), slip op. (Chicot County Ark. Ch. Ct. July 20, 1985).

of water only on land owned or occupied by the applicant or on beds of streams owned by the state.[362] If a permitted dam impounds water unlawfully on land not owned or occupied by the permit holder, the owner of land whose land is affected has an action at law for trespass damages and has the right to take water from the impoundment at a point on his land so long as the water is unlawfully impounded.[363] Similarly, a person whose land was affected by impounded water by a dam exempt from permit would have a cause of action for damages. The original legislation on dams indicates that a person whose land was "materially injured" by overflow from a dam is entitled to recover double damages in a civil action.[364] The court has interpreted the provision on double damages as being inapplicable absent a showing of willful wrongdoing.[365]

Another problem in the construction of dams is that related to land ownership and impoundment area. Beds of streams in navigable waters belong to the state and under the authority specified in the permit construction legislation could be covered by impounded water. However, beds of non-navigable streams belong to the riparian landowners and are subject to control by such landowners. The procedures outlined above would be applicable to any construction of impoundments in those streams.

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[362] Ark. Code Ann. § 22-22-210(3).

[363] Ark. Code Ann. § 15-22-216.

[364] Ark. Code Ann. § 18-15-702.

[365] Turner v. Smith, 217 Ark. 441, 231 S.W.2d 110 (1950).

Question 17. Will farmers that do not participate in the project still be entitled to their riparian right?

The creation of a district would in no way affect the existing riparian rights of farmers who do not participate in the project. Their rights are specifically recognized in all the legislative efforts to revise Arkansas water law and, in particular, their rights are provided for in the allocation scheme if the use is properly registered (See Question 2). While failure to register may not deprive them of the right, ASWCC does not have to make an allocation to them during shortage. And, such persons would be entitled to make their own applications for transfer of stream water to nonriparian land on the same basis as any other persons. (Also see Question 10)

Question 18. Does the WRRIWDD have the authority to float bonds for payment of the project? Can they do this although it may be several years from initiation of construction before benefits of the project are realized?

The WRRIWDD would be specifically authorized to issue tax exempt bonds (exempt from state, county and municipal taxes) to generate financing for the project. (It may also borrow money.) These bonds are to be negotiable coupon bonds which may mature at various times up to 40 years from the date of issuance.[366]

The exact nature of the bonds is quite flexible and may contain "such terms, covenants and conditions" as the board may

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[366] Ark. Code Ann. § 14-116-402(7).

provide by resolution. They may bear interest at rates authorized by the board, be payable where and how the board designates, and may be subject to a trust indenture entered with a bank or trust company.[367] The bonds may be sold at a price determined by the board.[368]

Question 19. What action is required for by the WRRIWDD to become an improvement district or a group of smaller districts with special improvement taxing authority?

For WRRIWDD to become an improvement district, with taxing authority, would require amendment of the original act to incorporate such authority as now provided for districts organized under the 1949 Irrigation, Drainage and Watershed Improvement District Act. Presumably, this additional authority could extend to previously organized districts (especially if the legislation so specifies). This type of amendment would seemingly be required because the Act specifies that no other law of the state applies to districts organized under the Act.[369] Thus, the general provisions relating to public improvement districts would not be applicable.

However, the extension of assessment and taxing authority to a previously organized district could pose potential legal difficulties if landowners within the boundaries objected. At

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[367] Ark. Code Ann. § 14-116-402(7)(B) & (C).

[368] Ark. Code Ann. § 14-116-402(7)(E).

[369] Ark. Code Ann. § 14-116-104.

the very least, many might choose to ask that they be excluded from the district. For this reason, other options should be explored. One such option would be the creation of a number of sub-districts under the 1949 Irrigation, Drainage and Watershed Improvement District Act. Each new sub-district would have the desired authority and could then contract with WRRIWDD for water distribution services. Such inter-local cooperation is contemplated by the Interlocal Cooperation Act[370] although only regional water distribution districts are mentioned in that Act. (See Question 20). Amendment of both the Interlocal Cooperation Act and the distribution district legislation would be necessary to assure that such agreements were valid. A more logical approach would be to amend the distribution district legislation to allow a note by property owners within the district at some future time to adopt assessment and taxing authority or to authorize the district board to exercise this authority.

The only reference to voting in the distribution district legislation is to the election of Board members "as a part of the general election and under the laws governing it."[371] Nomination is by "qualified electors residing in the area of the district."[372] While this statutory method applies to the elections of Board members, it is not typical of the legislation in many states which provides for voting on the basis of land

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[370] Ark. Code Ann. § 25-20-101 et seq.

[371] Ark. Code Ann. § 14-116-303.

[372] Id.

ownership. In two separate cases before the United States Supreme Court special purpose districts organized primarily to obtain and distribute irrigation water were not considered bound by the "one person, one-vote" principle of the constitutional equal protection clause. In Salyer Land Co. v. Tulare Lake Basin Water Storage District[373] the court upheld a California provision that allowed district elections to be limited to those who owned land in the district and votes apportioned according to the assessed value of the included land. The court considered the district to be a special purpose district not engaging in general governmental activities. Similarly, in Ball v. James[374] a district organized under Arizona law limited voting to landowner and votes were apportioned according to the number of acres owned. Although this district engaged in activities well beyond water distribution (e.g., power generation and distribution) the court upheld the voting scheme based on the relatively narrow water functions.

The relevance of the decisions to any plan to change the assessment and taxing authority of WRRIWDD is that legislation which authorized a vote within the district to permit the board to adopt assessment and taxing authority could be limited to landowners whose land would be subject to such assessment and tax. And, the voting rights could be apportioned according to either acreage or assessed value.

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[373] 410 U.S. 710 (1973).

[374] 451 U.S. 355 (1981).

Question 20. There are a number of drainage and/or improvement districts located within the jurisdiction boundary of the WRRIWDD. What are the ramifications of this in regards to drainage and water supply?

The mere fact that various types of districts are located within the same jurisdictional boundary does not, of itself, pose a particular legal problem. The generally accepted view is that so long as the purposes differ, such districts may exist concurrently, each serving the territory described at its formation or as subsequently modified. And, even if the purposes overlap, if it can be shown that each provides benefits to property owners, they may exist concurrently.

For example, in Pendleton v. Stuttgart & King's Bayou Drainage and Irrigation Dist.,[375] in evaluating the question of overlapping districts, the court indicated that the inclusion of lands already in an existing district has been approved several times in the past (citing cases) so long as the land is benefited by both districts. And, the court indicated that even indirect benefits are sufficient for approval of inclusion of lands. The districts involved were old drainage districts which were inactive which would be overlain by a new drainage and irrigation district to be formed under Act 329 of 1949. However, the court's decision related to inclusion of land in more than one district did not hinge on the question of inactivity of the old districts but rather on the question of whether the land benefits

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[375] 235 Ark. 513, 360 S.W.2d 750 (1962).

from both districts.

Any problems arising from potential territorial overlap is likely to be resolved during the district formation process. First, the petition for district establishment must describe the benefits to be received by the residents and property owners in the territory of the proposed district.[376] Second, the Act calls for review of the petition by the ASWCC and, in its report, the Commission must indicate how the proposed boundaries of the district conflict with the boundaries of any existing district.[377] In addition, the Commission must make findings as to whether the organization of the district would be "conducive" to the purposes of the Act and whether the statement of purposes in the petition conforms to the "intent and purposes" of the Act as applied to the area within the proposed boundaries.[378] The Commission may, in effect, modify the petition by including in the report any "conditions, revisions, including revisions of area, or limitations" which the Commission deems necessary.[379]

As a matter of practice, the Commission has pointed out boundary conflicts in districts of the same type (e.g., regional water distribution districts) and these have been considered by the courts to be amendments to the petitions and, to date, the Commission revisions have been approved without question by the

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[376] Ark. Code Ann. § 14-116-202(3).

[377] Ark. Code Ann. § 14-116-204(c)(1).

[378] Ark. Code Ann. § 14-116-204(c)(1) and (2).

[379] Ark. Code Ann. § 14-116-204(c)(4).

appropriate courts. For example, when the Circuit Court of Lonoke County received a petition to establish the Bayou Meto Irrigation District[380] the initial report of the ASWCC indicated that the boundaries would conflict with those of the WRRIWDD and the overlap was described.[381] A subsequent report indicated that the overlapping area had been removed from the boundaries of WRRIWDD by order of the Circuit Court of Prairie County and the report provided a revised description which then became the basis for the Bayou Meto Regional Irrigation Water District approval.[382]

The Commission has also considered potential overlap in functions as well. In the report to the Circuit Court of Arkansas County regarding the formation of what became the WRRIWDD, the Commission noted that the area of the proposed irrigation district was contained in the boundaries of the Grand Prairie Regional Water Distribution District. The Commission suggested that limitations should be placed upon the proposed district to avoid "conflicts and competitions that may arise in the management of the region's water resources." The limitation was that the WRRIWDD refrain from any activity that would conflict with the existing district and "shall not distribute

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[380] In the Matter of The Bayou Meto Irrigation District, No. CIV. 91-56 Circuit Court of Lonoke County.

[381] "Report of the Arkansas Soil and Water Conservation Commission," April 17, 1991 Id.

[382] Id., November 19, 1991.

water for any purpose other than agricultural irrigation."[383]

The Act also specifically authorizes water districts created under the Act to jointly and cooperatively undertake and carry out projects and purposes authorized for a district acting alone.[384] This includes the power to enter agreements for joint or cooperative exercise of any power or authority to undertake projects contemplated by the Act.[385] Specific reference is made to the Interlocal Cooperation Act[386] for guidance in such agreements.[387] It should be noted that this section refers only to agreements between two or more water districts formed under the Act. It does not refer to agreements between these water districts and improvement districts nor are improvement districts mentioned in the Interlocal Cooperation Act.[388]

Since the Act itself limits the application of "any other law of this state, except as provided in this chapter" to water districts, only two or more water districts created under the Act would seem to be authorized to jointly and cooperatively carry

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[383] Report of the ASWCC, June 11, 1984, In the Matter of the Establishment of the White River – Grand Prairie Irrigation District, Circuit Court of Arkansas County Civil No. 80-63.

[384] Ark. Code Ann. § 14-116-106(a).

[385] Ark. Code Ann. § 14-116-106(b).

[386] Ark. Code Ann. § 25-20-101 et seq.

[387] Ark. Code Ann. § 14-116-106(a) and (c).

[388] See e.g., Ark. Code Ann. § 25-20-104 defining "public agency."

out projects.[389] This is reinforced by the omission of any other types of irrigation or drainage districts from the provision of the Interlocal Cooperation Act.

Water districts organized under the Act have broad authority to "make any and all contracts necessary or convenient for the exercise of the powers granted in this subchapter.[390] "Subchapter" in this section refers only to Subchapter 4 of the Act whereas the "joint project" authority is included in Subchapter 1 of the Act. Thus, unless the authority to enter joint projects and similar arrangements with other types of districts could be implied from the broad grant of authority to exercise "all powers as may be necessary, convenient, or appropriate to effectuate the purpose for which the water district is organized"[391] a water district's authority to reach agreements with other types of districts may be limited.

Furthermore, irrigation, drainage and watershed districts formed under Act 329 of 1949[392] are given no specific authority to cooperate with other districts, nor are drainage and levee improvement districts.[393]

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[389] Ark. Code Ann. § 14-116-104.

[390] Ark. Code Ann. § 14-116-402(12).

[391] Ark. Code Ann. § 14-116-402(16).

[392] Ark. Code Ann. § 14-117-101 et seq.

[393] Ark. Code Ann. § 14-120-101 et seq. or Ark. Code Ann. § 14-121-101 et seq.

Question 21. Could the WRRIWDD acquire a specific easement for the entire project area and qualify as a riparian user from the White River? If so, what type of easement would be required?

The question of which land is "riparian" under the traditional riparian rights doctrine is relevant to the issue of whether the district can qualify as a riparian user from the White River. Under the traditional rule water use was limited to that which is reasonable on riparian land within the same watershed, narrowly defined. Lower riparian owners who were adversely affected by an unreasonable use could take action in court to enjoin such uses. This would include the enjoining of nonriparian uses which might be considered unreasonable if harm resulted to riparian users. Under this system it was not unusual for nonriparian transfers to be made and to continue for long periods of time because no harm could be shown to riparian uses particularly in times of plentiful water. In effect, this system would allow the use of water by nonriparians or on nonriparian land so long as no harm resulted to riparians. These uses by nonriparians could be effectuated by use of "easements" or other agreements which provided access to the water.

A nonriparian could, of course, obtain even greater security of right by obtaining the agreement of lower riparians to such uses through "easements" in the form of covenants not to sue. If the nonriparian use was by a governmental or public agency with the power of eminent domain, this power could be exercised against the rights of riparians (with compensation) to secure the

right to continue to use water for purposes that otherwise might violate the reasonable use doctrine.

The 1985 surface water legislation makes an important change in the system in that it authorizes the ASWCC to permit nonriparian uses for reasonable and beneficial purposes. The rights of lower riparians are still protected even in the exercise of this authority because they must be considered in the agency's determination of whether excess surplus water exists in a given basin and, thus, is available for transfer to nonriparian uses. In addition, it is clear that the rights of existing riparian uses must be taken into account in any allocation of water by the agency during a period of shortage.

Even with the implementation of administrative control of nonriparian transfers, riparian owners, at least those who use water, would retain their rights and could complain if their rights were to be interfered with in any such transfer. Therefore, if a water distribution district wished to be assured that water from a riparian source, such as the White River, would be available in most circumstances, it would still be possible to either obtain agreement from lower riparians not to sue for any such uses or to obtain rights by the exercise of the power of eminent domain. The section of Act 114 granting the power of eminent domain to water distribution districts is broadly written to include the exercise of the power to acquire not only rights-of-way but also "other properties necessary in the construction

or operation of its property or business."[394] In addition, the powers section specifically authorizes such districts to "acquire, own, hold, maintain, operate, sell, dispose of, lease as lessor, exchange and mortgage" various types of facilities and "property rights."[395] Further, such districts may "acquire, own, hold, use, exercise" "rights, privileges, licenses, rights-of-way, and easements,[396] and may "acquire, own, hold, maintain, sell, exchange, and use any and all real and personal property, or any interest therein."[397]

It should be emphasized that under the nonriparian transfer procedure now authorized by the 1985 legislation, the necessity of obtaining or acquiring rights from lower riparians would seldom be necessary unless a district wished to be secure even during periods of shortage. And, to eliminate competing uses within the project area, it might be necessary to acquire rights of existing riparian users who might otherwise continue to take their reasonable share from natural watercourses in the project area. Since it is possible for landowners to be excluded from the district by showing they have adequate water available, riparian landowners within the district boundaries might choose this option and compete with the uses made by district. One way to eliminate these potential conflicts is by exercise of the

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[394] Ark. Code Ann. § 14-116-402(10).

[395] Ark. Code Ann. § 16-114-402(3)(D).

[396] Ark. Code Ann. § 16-114-402(5).

[397] Ark. Code Ann. § 16-114-402(6).

power of eminent domain to acquire the existing rights of such riparians.

Question 22. Is the proposed project consistent with the "Rules for Water Development Project Compliance" as set forth in the Arkansas State Water Plan?

The objective of the compliance rules is to assure that any proposed project complies with and implements the goals of the Arkansas Water Plan and "adequately coordinates the use of water resources within the region in which the project is located, and within the state as a whole."[398] ASWCC may approve an application only if it meets these criteria. It then becomes an amendment to the Arkansas Water Plan. The authority for the compliance rules is the legislation required the development of the Arkansas Water Plan. Under that legislation, no agency may engage in a water development project until a preliminary survey and report is submitted to ASWCC which sets forth "the purpose of the project, the benefits to be expected, the general nature of the works of improvement, the necessity, feasibility, and the estimated cost." The ASWCC must approve the report as in compliance with the Arkansas Water Plan.[399]

In this case, since one of the major goals of the Arkansas Water Plan is to promote the conversion of water use from critical groundwater resources to alternatives utilizing surface

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[398] Rules § 604.5.

[399] Ark. Code Ann. § 15-22-503(e).

water where it is available, the project should be consistent with the Arkansas Water Plan. The Plan specifically recommends that excess water from the White River and the Arkansas River be provided for use in the Grand Prairie region.

The Rules call for a detailed application and a preliminary engineering report.[400] Once the application and report are filed the ASWCC staff ascertains the accuracy of the data in the application and recommends approval or disapproval of the application.[401] Public notice and a public hearing are required since the approval or disapproval is considered an adjudication under the Arkansas Administrative Procedure Act.[402]

Question 23. In your estimation, what additional specific legislation will be required to make the Grand Prairie Area Demonstration Project and other similar projects successful?

The major impediments to successful project operation fall into two categories: (1) Those related to uncertainty in the general law regarding groundwater and surface water utilization; and (2) Those related to authority of special water distribution districts created under Act 114 of 1957. Some items may be addressed by change in ASWCC regulations rather than by legislation. These are summarized separately.

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[400] Rules §§ 602.1, 602.2.

[401] Rules § 603.3.

[402] Rules § 604.1 – 604.4.

Revision in Rules

(1) In the legislation authorizing a permitting scheme for nonriparian use, reference is made to "nonriparians." In the Rules a "person" may be authorized to divert and transfer excess surface water. "Person" is broadly defined and includes associations as well as governmental agencies. Water distribution districts were, no doubt, contemplated to qualify for transfer authority. However, the Rules implementing the transfer authority are more narrowly written, seemingly with individual applicants in mind. For example, the legal description of lands to be irrigated must be included in the permit application.[403] and the irrigation permit "runs with the land."[404] If a water distribution district is to be the entity authorized to divert and transfer surface water, these requirements would be particularly cumbersome.

(2) In providing for allocation during shortages the ASWCC rules indicate that a riparian landowner who has "not previously diverted water nor timely registered any previous diversion" is not to be granted an allocation during shortages (above that required for domestic use).[405] This is consistent with the original 1969 allocation legislation.[406] However, the rules add

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[403] Rules § 304.3.

[404] Rules § 304.13.

[405] Rules § 307.9.

[406] Ark. Code Ann. § 15-22-215(f).

confusion by indicating that nonriparian uses may be granted allocations if the use does not interfere with specific enumerated uses.[407] One of the enumerated uses is the "unregistered riparian uses" referred to in § 307.9 of the Rules. This may have intended to refer only to domestic uses by such unregistered riparians but, on the other hand, it may be an effort to comply with the language in the allocation statute indicating that the power of the Commission to make allocations "among persons taking water from streams during periods of shortage."[408] However, that statute also indicates that a nonriparian use of water is not to "supersede, subordinate, or otherwise take priority or precedence over a riparian right to divert water from a stream lake or panel."[409] Thus, the actual priority position of a riparian user who has not registered a diversion but has previously used water, although not currently doing, so is not addressed in light of the seemingly inconsistent language of the statute itself. This needs to be clarified in the rules.

(3) Under the rules, a nonriparian permit may be canceled if the permittee fails to take "reasonable steps" to obtain the ability to utilize the water within two years from the date of

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[407] Rules § 307.10.

[408] Ark. Code Ann. § 15-22-205.

[409] Ark. Code Ann. § 15-22-215(f).

issuance.[410] Since project construction might commence several years after the permit is issued, the rules should be expanded to indicate the types of activities qualify as "reasonable steps" toward utilization of the water.

(4) In the allocation procedures during periods of shortage the apparent intent is to make allocations within categories of uses (e.g., nonriparian intrabasin transfers) on a "first in time, first in right" basis. This is not detailed in the rules and some clarification would be helpful.

Water Utilization: Legislation Recommended

The 1985 surface water legislation and the 1991 groundwater legislation greatly enhanced the administrative authority of the ASWCC to deal with the allocation and use of water resources. However, in some cases the legislation and the implementing rules create uncertainties in the current state of the law that, by legislative amendment, could be substantially eliminated. The major problems identified are summarized here.

(1) The limitation of authorization to transfer only 25% of "excess" surface water appears unduly restrictive, given all the uses that must be taken into account in determining whether "excess" surface water exists in a given basin -- particularly if the transfer is intrabasin rather than interbasin. Perhaps, the

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[410] Rules § 304.12.

legislation should authorize a greater transfer (say 75%) when the transfer is intrabasin.

(2) To facilitate the conversion from groundwater to surface water sources, Act 1051 of 1985 gave the ASWCC the authority to authorize transportation of excess surface water to nonriparians. Much of the detail was left to implementing regulations. In those regulations at § 301.5 the ASWCC indicates that it may delegate its authority to a local district. While the ASWCC has specific authority to delegate power to allocate water during times of shortage under Ark. Code Ann. § 15-22-221, no similar delegation provision is included in the legislation related to nonriparian use otherwise. If the goal is to allow more local control, then broader delegation authority is necessary.

(3) The registration legislation requires those who divert surface water to register that diversion with the ASWCC or his "local conservation district."[411] Similarly, withdrawals of groundwater must be reported to the ASWCC or the local conservation district.[412] If allocation authority for surface water or operation of groundwater regulatory programs are to be delegated to water distribution districts, it seems logical that registration and reporting should be to such districts as well. The question of who is to receive the appropriate fees in such

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[411] Ark. Code Ann. § 15-22-215.

[412] Ark. Code Ann. § 15-22-302.

cases should likewise be addressed.

(4) The groundwater legislation contemplates the possibility of future regulatory programs in critical areas. A complicated scheme exists for protection of existing uses and uses to be implemented within one year of initiation of a regulatory program. Just what may be included in such a regulatory program, if implemented, is not set out in detail in either the statute or the Rules. Limitations on annual withdrawals, duration of rights, cancellation of rights, well spacing and groundwater classification and use are all specifically mentioned. Perhaps, this is broad enough for a comprehensive regulatory program, if necessary, but it does not mention a number of techniques that might be essential to actual implementation of a regulatory program. For example, rotational pumping, seasonal withdrawals, required conservation measures, are not referenced. The kind of authority given Groundwater Management Districts in Kansas or Natural Resource Districts in Nebraska is needed. (See Appendices C and D)

(5) One of the greatest weaknesses in the 1991 groundwater legislation is the provision that if a groundwater regulatory program is implemented, new wells will be "grandfathered" (automatically granted "rights") if completed within one year of the implementation of the regulatory program. Furthermore, no restrictions or limitations may be posed on these wells for a

period of four years. If the situation is serious enough for the designation of an area as a "critical groundwater area" and the implementation of a regulatory program, this "grandfathering" provision is counter-productive and will encourage the exact behavior the regulatory program will be designed to prevent. This aspect of the groundwater legislation should be eliminated.

District Authority: Legislative Recommendations

The Regional Water Distribution District Act[413] confers much more limited authority on districts organized under that legislation than that given to districts organized under the Arkansas Irrigation, Drainage and Watershed Improvement District Act[414] This is, in part, because of the difference in organization requirements (100 owners vs. majority). It is a rock bottom principle that special districts only have such power and authority as specified in the legislation (or which can be implied from it) authorizing their creation.

(1) The Regional Water Distribution District Act gives broad authority to the district to acquire water, water storage and withdrawal rights and to enter contracts to carry out the powers of the district.[415] By contrast the 1949 Act has a detailed section related to contracts between districts and the United

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[413] Act 114 of 1957.

[414] Act 329 of 1949.

[415] Ark. Code Ann. § 14-116-402(3)(A) and (B), (12).

States.[416] (See Appendix A)

(2) The 1949 Act gives districts authority to accept appropriations from the state.[417]

> The board may also accept appropriations from the state upon such terms and conditions as may be imposed by law or regulation to be used in the furtherance of the purposes for which the district was authorized.

No similar authority exists for regional water distribution districts.

(3) The 1949 Act empowers the district Board to enter land within the district to make surveys and for other purposes.[418]

> The board, its agents, and its employees shall have the right to enter upon any land within the district to make surveys and for other purposes.

No similar authority exists for regional water distribution districts.

(4) The Regional Water Distribution Act contains a specific method by which land may be excluded from the district.[419] A related provision appears in the 1949 Act but it also provides a method by which additional land may be <u>included</u> in the

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[416] Ark. Code Ann. § 14-117-402.

[417] Ark. Code Ann. § 14-117-304(c).

[418] Ark. Code Ann. § 14-117-304(b).

[419] Ark. Code Ann. § 14-116-207.

district.[420] No similar provision exists for the regional water distribution district once established. The only method is by petition of landowners themselves. The 1949 Act provision appears to be more complete. (See Appendix B)

(5) Neither the Regional Water Distribution Act nor the Interlocal Cooperation Act specifically authorize water distribution districts to enter into agreements with drainage districts, irrigation districts or other districts organized under separate legislation. This authority should be explicitly stated in both acts.

(6) The district's authority to deal with water developed by the district but being transported in natural streams should be clarified. The district powers suggests that such water is to be controlled and regulated by the district but existing riparian uses would apparently have to be recognized. If the district is to control this water, the power to regulate withdrawals is probably sufficient but is should be expressly stated in the legislation that the placing of such developed water in natural streams in no way makes it available to existing riparian users who are not receiving water from the system and paying its rates and charges.

(7) If the power to regulate groundwater is to be delegated to a

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[420] Ark. Code Ann. § 14-117-208.

water distribution district, as provided in the groundwater legislation, not only should the types of regulatory authority be more clearly spelled out as suggested above, but the district may wish to have the authority to impose user charges for groundwater as now provided in the Kansas groundwater legislation. (See Appendix D)

(8) The 1949 Act allows drainage and irrigation districts considerable assessment authority[421] as well as taxing authority.[422] No similar authority exists for districts organized as regional water distribution districts. They are apparently limited to the generation of revenues from "rates, fees, rent, or other charges for water and other facilities, supplies, equipment, or services furnished by the water district."[423] This limitation may pose the most serious obstacle to future operation of a district. Legislation to simply add such authority would be questionable. However, one approach might be to amend the legislation to allow for a future vote by property owners included within the district to adopt assessment and taxing authority. Again, because such districts have only that authority granted by the legislation, this change would seem appropriate.

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[421] Ark. Code Ann. § 14-117-403 et seq. and 14-117-209.

[422] Ark. Code Ann. § 14-117-413 et seq. and 14-117-420.

[423] Ark. Code Ann. § 14-116-404 and 14-116-402(13).

An Alternative Proposal

It is clear from an examination of the existing water resource legislation that the legislature wished to involve local entities to the greatest extent possible in decisions involving management of water, both surface and groundwater. Not only may ASWCC delegate allocation authority to such districts, but the entire groundwater regulatory program, if implemented, may be delegated in a similar fashion. And, the ASWCC Rules contemplate delegation of certain surface water management decisions. This delegation may be to either "water districts," meaning water distribution districts, or "local conservation districts."

In those situations where ASWCC finds that an area should be designated as a "critical groundwater area" it will become desirable to implement groundwater control measures and also to encourage conversion to surface water sources. It would seem logical to allow water distribution districts greater flexibility in dealing with management of all water in such local areas. One approach would be to provide for the designation of a local water districts as a "water management district" with the type of authority available to the Kansas Groundwater Management District and the Nebraska National Resources District. The local district would continue its development programs and projects but would also assume all water management responsibility subject, of course, to oversight by the ASWCC. (It is likely that in some areas water distribution districts might not exist, so a similar designation could be made of a local conservation district.)

Attached hereto as Appendices C and D are the complete statutes relating to the Kansas and Nebraska programs.

Question 24. What are some typical water contracts that have been used by entities in the past to sell irrigation water to farmers?

The WRRIWDD is currently collecting contact information on water districts throughout the country. Once this information is available, sample contracts may be collected and included in a later Appendix to this report. However, a few general observations about such contracts may be made.

Water districts have been described as "enjoying the flexibility of private corporations and the powers of government."[424] As a result these districts have almost complete autonomy to enter into any type of agreements necessary to fulfil their purposes. The Arkansas statute clearly emphasizes this idea giving water distribution districts the power to: "make any and all contracts necessary or convenient for the exercise of the powers granted in this subchapter."[425] In addition the district is empowered to "fix, regulate, and collect rates, fees, rents, or other charges for water" and for services furnished by the water district.[426]

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[424] Leshy, "Irrigation Districts in a Changing West -- An Overview," in "Special Project: Irrigation Districts," 1982 Ariz. St. L.J. 345 at 355.

[425] Ark. Code Ann. § 14-116-402(12).

[426] Ark. Code Ann. § 14-116-402(13)(A).

The only restrictions appear to be that the rates must be "just, reasonable, and nondiscriminatory" and if water is distributed to consumers outside the district boundary the charges must be calculated in such a way so that no part of the cost of distributing water outside the district is borne by members of the district.[427]

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[427] Ark. Code Ann. § 14-116-402(13)(B)&(C).

Appendix A

14-117-402. Contracts between district and United States.

(a) The board is authorized to:

(1) Cooperate with the United States or any agency or instrumentality thereof, hereinafter referred to as the United States, in the development of plans for the construction, operation, and maintenance of any facilities which the district is authorized to construct, operate, and maintain;

(2) Negotiate a contract with the United States or give such assurance as may be required by the United States for the construction, operation, and maintenance of such facilities or any part thereof by the United States.

(A) The contract or assurance may provide for the payment by the district to the United States of the agreed costs thereof in the form of construction charges, operation and maintenance charges, water rental, or service charges.

(B) The construction charges may include the cost of works of improvement for irrigation, drainage, flood control, prevention of seepage of irrigated lands, prevention of erosion, floodwater, and sediment damages, and the conservation, development, utilization, and disposal of water.

(C) The contract or assurance may provide for the repayment of the various charges by the district primarily or exclusively from revenue to be derived by the district from the sale under contract between the district and its water users from the district works, with payment to be made either in the form of agricultural products or cash. However, if sufficient revenue is not available from this source or if the district was organized primarily for purposes other than irrigation, then the board shall have authority to assess benefits against the property within the district for the purpose of repaying the obligations of the district under the terms of the contract with or assurances given to the United States.

(D) The contract or assurance may provide that the district shall furnish lands, easements, and rights-of-way and that property so acquired by the district may be conveyed to the United States insofar as the property may be required for the construction, operation, and maintenance of works thereon by the United States for the benefit of the district.

(E) The contract or assurance may provide that the district shall save and hold harmless the United States from any liability or damages due to or arising out of the construction, operation, and maintenance of any of the works.

(b) Until all moneys receivable by the United States from the district under the contract or assurance shall have been fully paid, the boundaries of the district shall not be altered without the consent of the United States.

(c) Any indebtedness to the United States shall be and remain a prior charge against the lands of the district. It shall be paid by sale or rental of water or service under contract with the landowners of the district, by the annual levy of assessments by the commissioners against the district lands or by advance toll charge, all as herein provided, and the obligation to the United States shall so remain prior to any subsequent obligation of the district.

(d)(1) After the terms of the contract or assurance have been negotiated with the United States, the board shall petition the chancery or circuit court for the approval, if necessary, of a bond issue or other evidence of indebtedness by the district for the purpose of paying for preliminary expenses and the cost of acquisition of lands, easements, and rights-of-way which may be needed in order to carry out the plan of improvement.

(2) The chancery or circuit clerk shall thereupon give notice by publication for two (2) weeks in some newspaper published and having a general circulation in the county or counties within the district, calling upon all persons owning property within the district to appear before the court upon some date not less than thirty (30) days nor more than ninety (90) days from the date of the last publication, to be fixed by the court, to show cause in favor of or against the issuance of bonds or other evidence of indebtedness.

(3) If upon final hearing the court deems it to be in the best interest of the owners of real property within the district, the court shall enter an order authorizing the issuance of bonds or other evidence of indebtedness. However, if it is determined by the court that a majority in number of the holders of title to the lands within the district and the owners of a majority in value of the lands therein, as shown by the last assessment, oppose the issuance of bonds or other evidence of indebtedness, the court shall enter a decree disapproving the issuance of bonds or other evidence of indebtedness.

(4) The order of the court shall have the force of a judgment, and any aggrieved party may appeal from the order as provided in § 14-117-207.

Appendix B

14-117-208. Changing district boundaries.

(a)(1) The holder or holders of title representing in assessed value one-half (1/2) or more of any body of lands benefited or capable of being benefited by the works of a district may petition the chancery or circuit court which established the district to change the boundaries of the district to include that body of lands.

(2) Any owner of lands within the boundaries of a district may also petition the court to change the boundaries of the district to exclude such lands.

(b) The petition shall describe the boundaries of the parcel or tract of land owned by the petitioner or petitioners.

(c) The clerk shall give notice by publication for two (2) weeks in some newspaper published and having a general circulation in the county or counties within the district, calling upon all persons owning property within the district and, in the case of a proposed inclusion of lands, all persons owning property within the area proposed to be included to appear before the court on some day to be fixed by the court to show cause in favor of or against the inclusion or exclusion of lands of petitioners.

(d) If the court deems it to be to the best interest of the district that the lands be included or excluded from the district, it shall make an appropriate order upon its records changing the boundaries of the district.

(e) If the court finds that lands should be included in the district, the court shall make a finding and order as to an equitable amount to be paid by the petitioner or petitioners in lieu of the amount the petitioners or their grantors would have been required to pay to the district as assessments had the lands been included in the district at the time the district was originally formed. These amounts shall be divided into installments as the court may determine and shall be added to and be collected with any assessments subsequently levied against the assessment of benefits and shall be a part of the assessment of benefits.

(f) If the court finds that lands should be excluded from the district, the court shall make a finding and order as to the amount, if any, which shall be refunded by the district to any and all persons who have paid any assessment or assessments to the district.

(g) In making this determination, the court shall consider whether the parties have realized benefits from the organization and operation of the district, and the value of those benefits as determined by the court shall be deducted from the assessments paid in by the parties.

(h) No land excluded from the district shall be released from any obligation to pay any valid outstanding indebtedness of the district at the time of filing the petition for exclusion unless the holders of the indebtedness shall assent to the release of the lands from such obligation.

(i) All costs of the proceedings shall be assessed against the petitioners.

(j) Appeals from judgments of the court made pursuant to this section shall be taken by an aggrieved party in accordance with the provisions of § 14-117-207.

Appendix C

(f) NEBRASKA GROUND WATER MANAGEMENT AND PROTECTION ACT

46-656. Declaration of intent and purpose. The Legislature finds that ground water is one of the most valuable natural resources in the state and that an adequate supply of ground water is essential to the general welfare of the citizens of this state and to the present and future development of agriculture in the state. The Legislature recognizes its duty to define broad policy goals concerning the utilization and management of ground water and to ensure local implementation of those goals. Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the correlative rights of other landowners when the ground water supply is insufficient for all users. The Legislature determines that the goal shall be to extend ground water reservoir life to the greatest extent practicable consistent with beneficial use of the ground water and best management practices.

The Legislature further recognizes and declares that the management, protection, and conservation of ground water and the beneficial use thereof are essential to the economic prosperity and future well-being of the state and that the public interest demands procedures for the implementation of management practices to conserve and protect ground water supplies and to prevent the contamination or inefficient or improper use thereof. The Legislature recognizes the need to provide for orderly management systems in areas where management of ground water is necessary to achieve locally determined ground water reservoir life goals and where available data, evidence, or other information indicates that present or potential ground water conditions, including subirrigation conditions, require the designation of areas with special regulation of development and use.

Nothing in the Nebraska Ground Water Management and Protection Act relating to the contamination of ground water is intended to limit the powers of the Department of Environmental Quality provided in Chapter 81, article 15.

Source: Laws 1975, LB 577, § 1; Laws 1981, LB 146, § 4; Laws 1982, LB 375, § 1; Laws 1983, LB 378, § 1; Laws 1984, LB 1071, § 1; Laws 1986, LB 894, § 20; Laws 1993, LB 3, § 7.
Effective date September 9, 1993.

46-657. Terms, defined. For purposes of the Nebraska Ground Water Management and Protection Act and sections 46-601 to 46-613.02 and 46-636 to 46-655, unless the context otherwise requires:

(1) Person shall mean a natural person, a partnership, a limited liability company, an association, a corporation, a municipality, an irrigation district, an agency or a political subdivision of the state, or a department, an agency, or a bureau of the United States;

(2) Ground water shall mean that water which occurs in or moves, seeps, filters, or percolates through ground under the surface of the land;

(3) Contamination or contamination of ground water shall mean nitrate nitrogen or other material which enters the ground water due to action of any person and causes degradation of the quality of ground water sufficient to make such ground water unsuitable for present or reasonably foreseeable beneficial uses;

(4) District shall mean a natural resources district operating pursuant to Chapter 2, article 32;

(5) Director shall mean the Director of Water Resources;

(6) Illegal water well shall mean (a) any water well operated or constructed without or in violation of a permit required by the act, (b) any water well not in compliance with rules and regulations adopted and promulgated pursuant to the act, (c) any water well not properly registered in accordance with sections 46-602 to 46-604, or (d) any water well not in compliance with any other applicable laws of the State of Nebraska or with rules and regulations adopted and promulgated pursuant to such laws;

(7) Control area shall mean any area so designated by the director following a public hearing initiated and conducted pursuant to section 46-658;

(8) To commence construction of a water well shall mean the beginning of the boring, drilling, jetting, digging, or excavating of the actual water well from which ground water is to be withdrawn;

(9) Management area shall mean any area so designated by a district pursuant to sections 46-673.01 to 46-673.06;

(10) Ground water reservoir life goal shall mean the finite or infinite period of time which a district establishes as its goal for maintenance of the supply and quality of water in a ground water reservoir at the time a ground water management plan is adopted;

(11) Board shall mean the board of directors of a district;

(12) Irrigated acre shall mean any acre that is certified as such pursuant to rules and regulations of the district and that is actually capable of being supplied water through irrigation works, mechanisms, or facilities existing at the time of the allocation;

(13) Acre-inch shall mean the amount of water necessary to cover an acre of land one inch deep;

(14) Subirrigation or subirrigated land shall mean the natural occurrence of a ground water table within the root zone of agricultural vegetation, not exceeding ten feet below the surface of the ground;

(15) Best management practices shall mean schedules of activities, maintenance procedures, and other management practices utilized to prevent or reduce present and future contamination of ground water which may include irrigation scheduling, proper timing of fertilizer and pesticide application, and other fertilizer and pesticide management programs;

(16) Special ground water quality protection area shall mean any area designated as such by the Director of Environmental Quality following a public hearing, with boundaries approved by the Director of Environmental Quality, in which contamination of ground water is occurring or is likely to occur in the reasonably foreseeable future;

(17) Point source shall mean any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, vessel, other floating craft, or other conveyance, over which the Department of Environmental Quality has regulatory authority and from which a substance which can cause or contribute to contamination of ground water is or may be discharged;

(18) Allocation shall mean the allotment of a specified total number of acre-inches of irrigation water per irrigated acre per year or an average number of acre-inches of irrigation water per irrigated acre over any reasonable period of time not to exceed five years;

(19) Rotation shall mean a recurring series of use and nonuse of irrigation wells on an hourly, daily, weekly, monthly, or yearly basis; and

(20) Water well shall have the same meaning as in section 46-601.01.

Source: Laws 1975, LB 577, § 2; Laws 1980, LB 643, § 9; Laws 1981, LB 146, § 5; Laws 1981, LB 325, § 1; Laws 1982, LB 375, § 2; Laws 1983, LB 378, § 2; Laws 1984, LB 1071, § 2; Laws 1986, LB 886, § 5; Laws 1986, LB 894, § 21; Laws 1991, LB 51, § 1; Laws 1993, LB 3, § 8; Laws 1993, LB 121, § 279; Laws 1993, LB 131, § 24; Laws 1993, LB 439, § 1; Laws 1993, LB 789, § 5.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB 3, section 8, with LB 121, section 279, LB 131, section 24, LB 439, section 1, and LB 789, section 5, to reflect all amendments.

Note: The changes made by LB 789, section 5, became effective April 23, 1993. The changes made by LB 3, section 8, LB 121, section 279, and LB 439, section 1, became effective September 9, 1993. The changes made by LB 131, section 24, became operative September 9, 1993.

46-658. Control area; how determined; considerations; hearing; initiated by district; when held; notice; determination by director; order designating control area; modification of control area boundaries; procedure. (1) An area may be designated a control area by the director following a hearing initiated in accordance with subsection (3) of this section if it is determined, following evaluation of relevant hydrologic and water quality data, history of developments, and projection of effects of current and new development, that development and utilization of the ground water supply has caused or is likely to cause within the reasonably foreseeable future the existence of either of the following conditions:

(a) An inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply; or

(b) Dewatering of an aquifer, resulting in a deterioration of the quality of such ground water sufficient to make such ground water unsuitable for the present purposes for which it is being utilized.

(2) When determining whether to designate a control area because of the existence of any of the conditions listed in subsection (1) of this section, the director's considerations shall include, but not be limited to, whether conflicts between ground water users are occurring or may be reasonably anticipated or whether ground water users are experiencing or will experience within the foreseeable future substantial economic hardships as a direct result of current or anticipated ground water development or utilization.

(3) A hearing to designate a control area may be initiated by a district whenever it has information sufficient in the opinion of the board to require that any portion of such district should be designated as a control area. The board shall report such information to the director with a request that a hearing be held to determine if a control area should be established. The request shall be accompanied by a general description of the area proposed for inclusion in such control area.

(4)(a) Within thirty days after a hearing has been initiated pursuant to subsection (3) of this section, the director shall consult with the district and fix a time and place for a public hearing to consider the information supplied and to hear any other evidence. The hearing shall be held within one hundred twenty days after it has been initiated, shall be open to the public, and shall be located within or in reasonable proximity to the area proposed for designation as a control area. If, from information submitted by the district or otherwise available to the director, the director has reason to believe that area other than that identified by the district should be considered for inclusion in any control area which would be established as a result of such request, he or she shall so notify the district or districts whose boundaries encompass such additional area. Notice of the hearing shall be published at the expense of the district or districts in such newspapers as are necessary to provide for general circulation within the geographic area at least once each week for three consecutive weeks, the last publication to be not less than seven days prior to the hearing. The notice shall provide a general description of all area which will be considered by the director for inclusion in the control area.

(b) At the hearing, all interested persons shall be allowed to appear and present testimony. The Conservation and Survey Division of the University

of Nebraska, the Nebraska Natural Resources Commission, and the Department of Environmental Quality shall offer as evidence any information in their possession which they deem relevant to the purposes of the hearing. After the hearing and after any studies or investigations conducted by or on behalf of the director as he or she deems necessary, the director shall determine whether a control area shall be designated. If the director determines that no control area shall be established, he or she shall issue an order declaring that no control area shall be designated.

(c) If the director determines that a control area shall be established, he or she shall consult with such relevant state agencies named in subdivision (b) of this subsection and with the district or districts affected and determine the boundaries of the control area, taking into account the considerations enumerated in subsection (1) of this section, the effect on political subdivisions, and the socioeconomic and administrative factors directly affecting the ability to implement and carry out local ground water management, control, and protection.

(d) If the director determines that contiguous area within the jurisdictional limits of one or more districts other than the district or districts which initiated the hearing is subject to the conditions identified in this section and therefor appropriate for inclusion in such control area, he or she shall so notify such other district or districts prior to issuance of the order designating the control area.

(e) When the boundaries of a control area have been determined, the director shall issue an order designating the area as a control area. Such an order shall include a geographic and a stratigraphic definition of the control area. Notice of the order shall be provided in the same manner as that provided for the hearing.

(5) Modification in control area boundaries or dissolution of a control area may be accomplished utilizing the procedure established in this section for the initial designation of such areas as control areas, but hearings for designation, modification, or dissolution of such control area may not be initiated more often than once a year.

Source: Laws 1975, LB 577, § 3; Laws 1979, LB 26, § 1; Laws 1981, LB 146, § 6; Laws 1986, LB 894, § 22; Laws 1991, LB 278, § 4; Laws 1992, LB 21, § 1; Laws 1993, LB 3, § 9.
Effective date September 9, 1993.

46-659. Construct water well in a control or management area; permit required; application; form; fee; contents; late permit application; fee. (1) Any person who intends to construct a water well, except test holes and dewatering wells with intended use of ninety days or less, in a control area or management area in this state on land which he or she owns or controls shall, before commencing construction, file with the district in which the water well will be located an application for a permit on forms provided by the district. Forms shall be made available at each district in which a control area or management area is located, in whole or in part, and at such other places as may be deemed appropriate. The district shall review such application and issue or deny the permit within thirty days after the application is filed.

(2) The application shall be accompanied by a seventeen-dollar-and-fifty-cent filing fee payable to the district, except as provided in subsection (8) of section 46-666, and shall contain (a) the name and post office address of the applicant or applicants, (b) the nature of the proposed use, (c) the intended location of the proposed water well or other means of obtaining ground water, (d) the intended size, type, and description of the proposed water well and the estimated depth, if known, (e) the estimated capacity in gallons per minute, (f) the acreage and location by legal description of the land involved if the water is to be used for irrigation, (g) a description of the proposed use if other than for irrigation purposes, and (h) such other information as the district requires. Before any water well having a capacity of less than one hun-

dred gallons per minute is modified to withdraw ground water at a rate equal to or greater than one hundred gallons per minute, an application shall be filed for a permit pursuant to this section before water is so withdrawn.

(3) Any person who has failed or in the future fails to obtain a permit required by subsection (1) of this section shall make application for a late permit on forms provided by the district.

(4) The application for a late permit shall be accompanied by a two-hundred-fifty-dollar fee payable to the district, except as provided in subsection (8) of section 46-666, and shall contain the same information required in subsection (2) of this section.

Source: Laws 1975, LB 577, § 4; Laws 1980, LB 643, § 10; Laws 1981, LB 325, § 2; Laws 1982, LB 375, § 16; Laws 1983, LB 23, § 3; Laws 1984, LB 1071, § 3; Laws 1986, LB 894, § 23; Laws 1993, LB 131, § 25.
Operative date September 9, 1993.

46-660. Permit; when denied; corrections allowed; fees nonrefundable. An application for a permit or late permit for a water well in a control area or management area shall be denied only if the district in which the water well is to be located finds (1) that the location or operation of the proposed water well or other work would conflict with any regulations or controls adopted by the district, (2) that the proposed use would not be a beneficial use of water for domestic, agricultural, manufacturing, or industrial purposes, or (3) in the case of a late permit only, that the applicant did not act in good faith in failing to obtain a timely permit. If the district finds that the application is incomplete or defective, it shall return the application for correction. If the correction is not made within sixty days, the application shall be canceled. All permits shall be issued with or without conditions attached or denied not later than thirty days after receipt by the district of a complete and properly prepared application. A permit issued shall specify all regulations and controls adopted by a district relevant to the construction or utilization of the proposed water well. No refund of any application fees shall be made regardless of whether the permit is issued, canceled, or denied. The district shall transmit one copy of each permit issued to the director.

Source: Laws 1975, LB 577, § 5; Laws 1980, LB 643, § 11; Laws 1982, LB 375, § 17; Laws 1983, LB 23, § 4; Laws 1984, LB 1071, § 4; Laws 1993, LB 131, § 26.
Operative date September 9, 1993.

46-661. Issuance of permit; no right to violate rules, regulations, or controls. The issuance by the district of a permit pursuant to section 46-660 or registration of a water well by the director pursuant to section 46-602 shall not vest in any person the right to violate any district rule, regulation, or control in effect on the date of issuance of the permit or the registration of the water well or to violate any rule, regulation, or control properly adopted after such date.

Source: Laws 1975, LB 577, § 6; Laws 1983, LB 23, § 5; Laws 1984, LB 1071, § 5; Laws 1993, LB 131, § 27.
Operative date September 9, 1993.

46-662. Issuance of permit; commence construction and complete water well within one year; failure; effect. When any permit is approved, the applicant shall commence construction as soon as possible after the date of approval and shall complete the construction and equip the water well prior to the date specified in the conditions of approval, which date shall be not more than one year after the date of approval, unless it is clearly demonstrated in the application that one year is an insufficient period of time for such construction. If the applicant fails to complete the project under the terms of the permit, the district may withdraw the permit.

Source: Laws 1975, LB 577, § 7; Laws 1983, LB 23, § 6; Laws 1993, LB 131, § 28.
Operative date September 9, 1993.

46-663. Natural resources district; powers; enumerated. Regardless of whether or not any portion of a district has been designated as a control area, management area, or special ground water quality protection area, in order to administer and enforce the Nebraska Ground Water Management and Protection Act and to effectuate the policy of the state to conserve ground water resources, a district may:

(1) Adopt and promulgate rules and regulations necessary to discharge the administrative duties assigned in the act;

(2) Require such reports from ground water users as may be necessary;

(3) Conduct investigations and cooperate or contract with agencies of the United States, agencies or political subdivisions of this state, public or private corporations, or any association or individual on any matter relevant to the administration of the act;

(4) Report to and consult with the Department of Environmental Quality on all matters concerning the entry of contamination or contaminating materials into ground water supplies; and

(5) Issue cease and desist orders, following ten days' notice to the person affected stating the contemplated action and in general the grounds for the action and following reasonable opportunity to be heard, to enforce any of the provisions of the act or of orders or permits issued pursuant to the act, to initiate suits to enforce the provisions of orders issued pursuant to the act, and to restrain the construction of illegal water wells or the withdrawal or use of water from illegal water wells.

Source: Laws 1975, LB 577, § 8; Laws 1979, LB 26, § 2; Laws 1982, LB 375, § 18; Laws 1984, LB 1071, § 6; Laws 1986, LB 894, § 24; Laws 1993, LB 3, § 10; Laws 1993, LB 131, § 29.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB 3, section 10, with LB 131, section 29, to reflect all amendments.

Note: The changes made by LB 3, section 10, became effective September 9, 1993. The changes made by LB 131, section 29, became operative September 9, 1993.

46-665. Natural resources district; conduct meeting to determine controls; hearings; when; public notice. (1) Following the designation of any area as a control area and at such other times as the district desires the adoption, amendment, or repeal of any control authorized by section 46-666, the district shall hold a public meeting to determine the type of controls to be imposed within that control area.

(2) Prior to the adoption, amendment, or repeal of any authorized control, the district shall hold one or more public hearings to consider testimony regarding such adoption, amendment, or repeal. The text of the control proposed for adoption or repeal or of the amendment shall be made available to the public at least thirty days prior to any such hearing. The hearings shall be held within or in reasonable proximity to the control area. Public notice of the time and place of all such hearings shall be given in the manner provided in section 46-658.

(3) At the hearing, all interested persons shall be allowed to appear and present testimony. The Conservation and Survey Division of the University of Nebraska, the Nebraska Natural Resources Commission, and the Department of Environmental Quality shall offer as evidence any information in their possession which they deem relevant to the purposes of the hearing.

Source: Laws 1975, LB 577, § 10; Laws 1979, LB 26, § 3; Laws 1981, LB 146, § 7; Laws 1984, LB 1071, § 7; Laws 1993, LB 3, § 11.
Effective date September 9, 1993.

46-666. Natural resources district; adopt one or more controls; uniformity, exception; restrict issuance of permits; publication of orders; joint exercise of authority between districts; failure of district to adopt controls; powers and duties of director; information to be supplied to director. (1) A

district in which a control area has been designated pursuant to subsection (1) of section 46-658 shall by order adopt one or more of the following controls for the control area:

(a) It may determine the permissible total withdrawal of ground water for each day, month, or year and allocate such withdrawal among the ground water users;

(b) It may adopt a system of rotation for use of ground water;

(c) It may adopt well-spacing requirements more restrictive than those found in sections 46-609 and 46-651;

(d) It may require the installation of devices for measuring ground water withdrawals from water wells; and

(e) It may adopt and promulgate such other reasonable rules and regulations as are necessary to carry out the purpose for which a control area was designated.

(2) In adopting, amending, or repealing any control authorized by subsection (1) of this section or sections 46-673.08 to 46-673.12, the district's considerations shall include, but not be limited to, whether it reasonably appears that such action will mitigate or eliminate the condition which led to designation of the control area or management area, will encourage a high degree of water use efficiency, or will improve the administration of the area.

(3) The adoption, amendment, or repeal of any authorized control in a control area shall be subject to the approval of the director. The director may hold a public hearing to consider testimony regarding the control prior to the issuance of an order approving or disapproving the adoption, amendment, or repeal of the control. The director shall consult with the district and fix a time, place, and date for such hearing. In approving the adoption, amendment, or repeal of an authorized control in a control area, the director's considerations shall include, but not be limited to, those enumerated in subsection (2) of this section.

(4) If because of varying ground water uses, different irrigation distribution systems, or varying climatic, hydrologic, geologic, or soil conditions existing within a control area or management area the uniform application throughout such area of one or more controls would fail to carry out the intent of the Nebraska Ground Water Management and Protection Act in a reasonably effective and equitable manner, the controls adopted by the district pursuant to subsection (1) of this section or sections 46-673.08 to 46-673.12 may contain different water allocations for different irrigation distribution systems, on the condition that such different water allocations shall be authorized for no more than five years from the time such allocations are adopted, and different provisions for different categories of ground water use or portions of the control area or management area. Any differences in such provisions shall recognize and be directed toward such varying ground water uses, distribution irrigation systems, or varying conditions. The provisions of all controls for different categories of ground water use shall be uniform for all portions of the area which have substantially similar climatic, hydrologic, geologic, and soil conditions.

(5) If the district determines, following a public hearing conducted pursuant to section 46-665, that depletion or contamination of the ground water supply in the control area or any portion of the control area is so excessive that the public interest cannot be protected solely through implementation of reasonable controls adopted pursuant to subsection (1) of this section, it may, with the approval of the director, close all or a portion of the control area to the issuance of any additional permits for a period of one calendar year. Such areas may be further closed thereafter by a similar procedure for additional one-year periods. Any such area may be reopened at any time the district determines that conditions warrant new permits at which time the

district shall consider all previously submitted applications for permits in the order in which they were received.

(6) The district shall cause a copy of each order adopted pursuant to this section or sections 46-673.08 to 46-673.12 to be published once each week for three consecutive weeks in a local newspaper published or of general circulation in the area involved, the last publication of which shall be not less than ten days prior to the date set for the effective date of such order.

(7) Whenever a control area or management area encompasses portions of two or more districts, the responsibilities and authorities delegated in this section and sections 46-665 and 46-673.08 to 46-673.12 shall be exercised jointly and uniformly by agreement of the respective boards of all districts so affected.

(8) If at the end of eighteen months following the designation of a control area pursuant to section 46-658 a district encompassed in whole or in part by a control area has not adopted any specific controls pursuant to subsection (1) of this section, the power to specify controls shall vest in the director who shall, within ninety days after the end of the eighteen months, adopt and promulgate by rule and regulation such controls as he or she deems necessary for carrying out the intent of the Nebraska Ground Water Management and Protection Act. Subject to section 46-667, the enforcement of controls adopted pursuant to this section shall be the responsibility of the district involved. When the controls adopted by the director pursuant to this subsection are in effect in a district, all application fees for water well permits in such district pursuant to section 46-659 shall be payable to the director.

(9) If the power to adopt controls in a control area is vested in the director, he or she shall be provided with a copy of all information, testimony, and data available to the district or districts as a result of the public hearing for the adoption of controls. At his or her discretion, the director may conduct one or more additional public hearings prior to making his or her determination or selection of controls. Notice of any such additional hearings shall be given in the manner provided in section 46-658.

Source: Laws 1975, LB 577, § 11; Laws 1978, LB 217, § 2; Laws 1979, LB 26, § 4; Laws 1980, LB 643, § 13; Laws 1981, LB 146, § 9; Laws 1982, LB 375, § 19; Laws 1983, LB 506, § 1; Laws 1983, LB 23, § 7; Laws 1984, LB 1071, § 8; Laws 1986, LB 894, § 25; Laws 1993, LB 131, § 30. Operative date September 9, 1993.

46-667. Hearing to determine proper enforcement of controls; when; how commenced; evidence; enforcement to revert to district; right to subsequent hearings. If at any time after a twelve-month period from the date of the order of the district or director, as the case may be, adopting a control pursuant to section 46-666 the governing body of any municipal corporation owning water wells within the affected control area or five percent of the water well owners in a control area allege by petition to the director that the adopted control is not being enforced uniformly, equitably, or in good faith, the director shall hold a hearing within sixty days, notice of which shall be given in the manner provided in section 46-658. The director shall receive evidence at the hearing to determine whether or not the adopted control is being enforced uniformly, equitably, and in good faith and if the director determines that the control is not being so enforced, then the enforcement power set out in section 46-666 shall vest in the director for a period of twelve months. At the end of the twelve-month period, enforcement shall revert to the district or districts involved. Nothing in this section shall restrict the right of a municipality or five percent of water well owners in a control area to repetition at any time for another hearing for the enforcement of controls.

Source: Laws 1975, LB 577, § 12; Laws 1984, LB 1071, § 9; Laws 1993, LB 131, § 31.
Operative date September 9, 1993.

46-673.03. Ground water management plan; director; review; duties. The director shall review any ground water management plan submitted by a district to ensure that the best available studies, data, and information were utilized and considered and that such plan is supported by and is a reasonable application of such information. If the primary purpose of the proposed management area is protection of water quality, the director shall consult with the Department of Environmental Quality regarding approval or denial of the management plan. The director shall consult with the Conservation and Survey Division of the University of Nebraska, the Nebraska Natural Resources Commission, and such other state or federal agencies the director shall deem necessary when reviewing plans. Within ninety days after receipt of a plan, the director shall transmit his or her findings, conclusions, and reasons for approval or disapproval to the district submitting the plan.

Source: Laws 1982, LB 375, § 5; Laws 1986, LB 894, § 27; Laws 1993, LB 3, § 12.
Effective date September 9, 1993.

46-673.05. Management area; establishment; when; hearing; notice; procedure. Prior to proceeding toward establishing a management area, a management plan shall have been approved by the director or the district shall have completed the requirements of section 46-673.04. In order to establish a management area, the district shall fix a time and place for a public hearing to consider the management plan information supplied by the director and to hear any other evidence. The hearing shall be located within or in reasonable proximity to the area proposed for designation as a management area. Notice of the hearing shall be given in accordance with section 46-658, shall provide a general description of the contents of the plan and of the area which will be considered for inclusion in the management area, and shall provide the text of the control proposed for adoption by the district. All interested persons shall be allowed to appear and present testimony. The hearing shall include testimony of a representative of the Department of Water Resources and, if the primary purpose of the proposed management area is protection of water quality, of the Department of Environmental Quality and shall include the results of any studies or investigations conducted by the district.

Source: Laws 1982, LB 375, § 7; Laws 1986, LB 894, § 28; Laws 1991, LB 51, § 2; Laws 1993, LB 3, § 13.
Effective date September 9, 1993.

46-673.09. District; manage use of water; means authorized. A district may manage the use of water in a management area for water quantity or quality purposes or both by any of the following means:

(1) Allocating the total permissible withdrawal of ground water;

(2) Rotation of use of ground water;

(3) Well-spacing requirements pursuant to section 46-673.12;

(4) Reduction of irrigated acres;

(5) Requiring the use of flow meters on water wells;

(6) Best management practices;

(7) Requiring the analysis of water or deep soils for fertilizer and chemical content; or

(8) Educational programs designed to protect water quality.

Source: Laws 1982, LB 375, § 11; Laws 1986, LB 894, § 30; Laws 1991, LB 51, § 4; Laws 1993, LB 439, § 2; Laws 1993, LB 131, § 32.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB 131, section 32, with LB 439, section 2, to reflect all amendments.

Note: The changes made by LB 439, section 2, became effective September 9, 1993. The changes made by LB 131, section 32, became operative September 9, 1993.

46-673.10. Ground water allocation; limitations and conditions. (1) If allocation is adopted for use of ground water for irrigation purposes in a management area, the permissible withdrawal of ground water shall be allocated equally per irrigated acre. Such allocation shall specify the total number of acre-inches that are allocated per irrigated acre per year, except that the district may allow a ground water user to average his or her allocation over any reasonable period of time not to exceed five years. A ground water user may use his or her allocation on all or any part of the irrigated acres to which the allocation applies.

(2) A ground water user in a management area shall not be prevented from increasing the number of acres which he or she irrigates, or otherwise adding new or additional acres or uses of ground water, but all such new or additional acres or uses shall be subject to the controls adopted pursuant to sections 46-656 to 46-674. A person who increases the number of acres which he or she irrigates, or otherwise adds new or additional uses of ground water, shall be entitled to the same allocation as existing acres or uses.

(3) If annual rotation or reduction of irrigated acres is adopted for use of ground water for irrigation purposes in a management area, the nonuse of irrigated acres shall be a uniform percentage reduction of each landowner's irrigated acres within the management area or a subarea of the management area. Such uniform reduction may be adjusted for each landowner based upon crops grown on his or her land to reflect the varying consumptive requirements between crops.

Source: Laws 1982, LB 375, § 12; Laws 1991, LB 51, § 5; Laws 1993, LB 439, § 3.
Effective date September 9, 1993.

46-673.11. District; review allocation, rotation, or reduction control; considerations. A district may annually and shall at least once every three years review any allocation, rotation, or reduction control imposed in a management area and shall adjust allocations, rotations, or reductions to accommodate new or additional uses or otherwise reflect findings of such review, consistent with the ground water reservoir life goal. Such review shall consider new development or additional ground water uses within the area, more accurate data or information that was not available at the time of the allocation, rotation, or reduction order, the availability of supplemental water supplies, any changes in ground water recharge, and such other factors as the district deems appropriate.

Source: Laws 1982, LB 375, § 13; Laws 1993, LB 439, § 4.
Effective date September 9, 1993.

46-674.02. Special protection area; legislative findings. The Legislature finds that:

(1) The levels of nitrate nitrogen and other contaminants in ground water in certain areas of the state are increasing;

(2) Long-term solutions should be implemented and efforts should be made to prevent the levels of ground water contaminants from becoming too high and to reduce high levels sufficiently to eliminate health hazards;

(3) Agriculture has been very productive and should continue to be an important industry to the State of Nebraska;

(4) Natural resources districts have the legal authority to regulate certain activities and, as local entities, are the preferred regulators of activities which may contribute to ground water contamination in both urban and rural areas;

(5) The Department of Environmental Quality should be given authority to regulate sources of contamination when necessary to prevent serious deterioration of ground water quality;

(6) The powers given to districts and the Department of Environmental

Quality should be used to stabilize, reduce, and prevent the increase or spread of ground water contamination; and

(7) There is a need to provide for the orderly management of ground water quality in areas where available data, evidence, and other information indicate that present or potential ground water conditions require the designation of such areas as special ground water quality protection areas.

Source: Laws 1986, LB 894, § 1; Laws 1993, LB 3, § 14.
Effective date September 9, 1993.

46-674.03. Special protection area; reports required. Each state agency and political subdivision shall promptly report to the Department of Environmental Quality any information which indicates that contamination is occurring.

Source: Laws 1986, LB 894, § 2; Laws 1993, LB 3, § 15.
Effective date September 9, 1993.

46-674.04. Special protection area; Department of Environmental Quality; conduct study; when; report. If, as a result of information provided pursuant to section 46-674.03 or studies conducted by or otherwise available to the Department of Environmental Quality and following preliminary investigation, the Director of Environmental Quality has reason to believe that contamination of ground water is occurring or likely to occur in an area of the state in the reasonably foreseeable future, the department shall, in cooperation with any appropriate state agency and district, conduct a study to determine the source or sources of the contamination and the area affected by such contamination and shall issue a written report within one year of the initiation of the study. The department shall consider the relevant water quality portions of the management plan developed by the district pursuant to section 46-673.01 during the study required in this section.

Source: Laws 1986, LB 894, § 3; Laws 1993, LB 3, § 16.
Effective date September 9, 1993.

46-674.05. Special protection area; contamination; point source; director; duties. If the Director of Environmental Quality determines from the study conducted pursuant to section 46-674.04 that one or more sources of contamination are point sources, he or she shall expeditiously use the procedures authorized in the Environmental Protection Act to stabilize or reduce the level and prevent the increase or spread of such contamination.

Source: Laws 1986, LB 894, § 4; Laws 1993, LB 3, § 17.
Effective date September 9, 1993.

Cross Reference

Environmental Protection Act, see section 81-1532.

46-674.06. Special protection area; contamination; not point source; director; duties; hearing; notice. If the Director of Environmental Quality determines from the study conducted pursuant to section 46-674.04 that one or more sources of contamination are not point sources and if a management area, the primary purpose of which is protection of water quality, has been established which includes the affected area, the Director of Environmental Quality shall consider whether to require the district which established the management area to adopt an action plan as provided in sections 46-674.07 to 46-674.11.

If the Director of Environmental Quality determines that one or more of the sources are not point sources and if such a management area has not been established, he or she shall, within thirty days after completion of the report required by section 46-674.04, consult with the district within whose boundaries the area affected by such contamination is located and fix a time and

place for a public hearing to consider the report, hear any other evidence, and secure testimony on whether a special ground water quality protection area should be designated. The hearing shall be held within one hundred twenty days after completion of the report, shall be open to the public, and shall be located within or in reasonable proximity to the area considered in the report. Notice of the hearing shall be published in such newspapers as are necessary to provide for general circulation within the geographic area at least once each week for three consecutive weeks, the last publication to be not less than seven days prior to the hearing. The notice shall provide a general description of all areas which will be considered for inclusion in the special ground water quality protection area.

At the hearing, all interested persons shall be allowed to appear and present testimony. The Conservation and Survey Division of the University of Nebraska, the Department of Health, the Department of Water Resources, the Nebraska Natural Resources Commission, and the appropriate district shall offer as evidence any information in their possession which they deem relevant to the purpose of the hearing. After the hearing and after any studies or investigations conducted by or on behalf of the Director of Environmental Quality as he or she deems necessary, the director shall determine whether a special ground water quality protection area shall be designated.

Source: Laws 1986, LB 894, § 5; Laws 1991, LB 51, § 9; Laws 1993, LB 3, § 18.
Effective date September 9, 1993.

46-674.07. Special protection area; designation; adoption of action plan; considerations; procedures; order. (1) When determining whether to designate a special ground water quality protection area or to require a district which has established a management area, the primary purpose of which is protection of water quality, to adopt an action plan for the affected area, the Director of Environmental Quality shall consider whether contamination of ground water has occurred or is likely to occur in the reasonably foreseeable future, whether ground water users, including, but not limited to, domestic, municipal, industrial, and agricultural users, are experiencing or will experience within the foreseeable future substantial economic hardships as a direct result of current or reasonably anticipated activities which cause or contribute to contamination of ground water, whether methods are available to stabilize or reduce the level of contamination, and administrative factors directly affecting the ability to implement and carry out regulatory activities.

(2) If the Director of Environmental Quality determines that no such area should be established, he or she shall issue an order declaring that no special ground water quality protection area shall be designated.

(3) If the Director of Environmental Quality determines that a special ground water quality protection area shall be established or that such a district shall be required to adopt an action plan, he or she shall consult with relevant state agencies and with the district or districts affected and determine the boundaries of the area, taking into account the effect on political subdivisions and the socioeconomic and administrative factors directly affecting the ability to implement and carry out local ground water management, control, and protection. The report by the Director of Environmental Quality shall include the specific reasons for the creation of the ground water quality protection area or the requirement of such an action plan and a full disclosure of the possible causes.

(4) When the boundaries of an area have been determined, the Director of Environmental Quality shall issue an order designating the area as a special ground water quality protection area or requiring such an action plan. Such an order shall include a geographic and a stratigraphic definition of the area.

Source: Laws 1986, LB 894, § 6; Laws 1991, LB 51, § 10; Laws 1993, LB 3, § 19.
Effective date September 9, 1993.

46-674.10. Special protection area; adoption or amendment of action plan; considerations; procedures; uniformity; exception. (1) In adopting or amending an action plan authorized by subsection (2) of this section, the district's considerations shall include, but not be limited to, whether it reasonably appears that such action will mitigate or eliminate the condition which led to designation of the special ground water quality protection area or the requirement of an action plan for a management area or will improve the administration of the area.

(2) The Director of Environmental Quality shall approve or deny the adoption or amendment of an action plan within one hundred twenty days after the date the plan is submitted by the district. He or she may hold a public hearing to consider testimony regarding the action plan prior to the issuance of an order approving or disapproving the adoption or amendment. In approving the adoption or amendment of the plan in such an area, considerations shall include, but not be limited to, those enumerated in subsection (1) of this section.

(3) If because of varying ground water uses or varying climatic, hydrologic, geologic, or soil conditions existing within a special ground water quality protection area or management area the uniform application throughout such area of one or more protective measures would fail to carry out the intent of the Nebraska Ground Water Management and Protection Act in a reasonably effective and equitable manner, the measures adopted by the district pursuant to subsection (1) of this section may vary. Any differences in such protective measures shall recognize and be directed toward such varying ground water uses or conditions. All protective measures for different categories of ground water use shall be uniform for all portions of the area which have substantially similar climatic, hydrologic, geologic, and soil conditions.

(4) If the director denies approval of an action plan by the district, the order shall list the reason the action plan was not approved. A district may submit a revised action plan within sixty days to the director for approval.

Source: Laws 1986, LB 894, § 9; Laws 1991, LB 51, § 13; Laws 1993, LB 3, § 20.
Effective date September 9, 1993.

46-674.11. Special protection area; district publish protective measure adopted. Following approval of the action plan by the Director of Environmental Quality, the district shall cause a copy of each protective measure adopted pursuant to section 46-674.10 to be published once each week for three consecutive weeks in a local newspaper published or of general circulation in the area involved, the last publication of which shall be not less than ten days prior to the date when such protective measure becomes effective.

Source: Laws 1986, LB 894, § 10; Laws 1993, LB 3, § 21.
Effective date September 9, 1993.

46-674.12. Special protection area; director specify protective measures; when; powers and duties. (1) The power to specify protective measures shall vest in the Director of Environmental Quality if (a) at the end of one hundred eighty days following the designation of a special ground water quality protection area or the requiring of an action plan for a management area pursuant to section 46-674.07, a district encompassed in whole or in part by a special ground water quality protection area or such a management area has not completed an action plan, (b) a district does not submit a revised action plan within sixty days after denial of its original action plan, or (c) the district submits a revised action plan which is not approved by the director.

(2) If the power to specify protective measures in a special ground water quality protection area or such a management area is vested in the Director

of Environmental Quality, he or she shall within ninety days adopt and promulgate by rule and regulation such measures as he or she deems necessary for carrying out the intent of the Nebraska Ground Water Management and Protection Act. He or she shall conduct one or more public hearings prior to the adoption of protective measures. Notice of any such additional hearings shall be given in the manner provided in section 46-674.06. The enforcement of protective measures adopted pursuant to this section shall be the responsibility of the Department of Environmental Quality.

Source: Laws 1986, LB 894, § 11; Laws 1991, LB 51, § 14; Laws 1993, LB 3, § 22.
Effective date September 9, 1993.

46-674.13. Special protection area; protective measures; duration; amendment of plan. The protective measures in the action plan approved by the Director of Environmental Quality pursuant to section 46-674.10 shall be exercised by the district for the period of time necessary to stabilize or reduce the level of contamination and prevent the increase or spread of ground water contamination. An action plan may be amended by the same method utilized in the adoption of the action plan.

Source: Laws 1986, LB 894, § 12; Laws 1993, LB 3, § 23.
Effective date September 9, 1993.

46-674.14. Special protection area; removal of designation or requirement of action plan; when. A district may petition the Director of Environmental Quality to remove the designation of the area as a special ground water quality protection area or the requirement of an action plan for a management area. If the director determines that the level of contamination in a special ground water quality protection area or a management area has stabilized at or been reduced to a level which is not detrimental to beneficial uses of ground water, he or she may remove the designation.

Source: Laws 1986, LB 894, § 13; Laws 1991, LB 51, § 15; Laws 1993, LB 3, § 24.
Effective date September 9, 1993.

46-674.15. Special protection area; order; appeal. Any person aggrieved by any order of the district or the Director of Environmental Quality issued pursuant to sections 46-674.02 to 46-674.20 may appeal the order, and the appeal shall be in accordance with the Administrative Procedure Act.

Source: Laws 1986, LB 894, § 14; Laws 1988, LB 352, § 79; Laws 1993, LB 3, § 25.
Effective date September 9, 1993.

Cross Reference
Administrative Procedure Act, see section 84-920.

46-674.16. Special protection area; Environmental Quality Council; adopt rules and regulations. The Environmental Quality Council shall adopt and promulgate, in accordance with the Administrative Procedure Act, such rules and regulations as are necessary to the discharge of duties under sections 46-674.02 to 46-674.20.

Source: Laws 1986, LB 894, § 15; Laws 1993, LB 3, § 26.
Effective date September 9, 1993.

Cross Reference
Administrative Procedure Act, see section 84-920.

46-674.18. Special protection area; district; duties. Each district in which a special ground water quality protection area has been designated or an action plan for a management area has been required pursuant to sections 46-674.02 to 46-674.20 shall, in cooperation with the Department of Environmental Quality, establish a program to monitor the quality of the ground water in the area and shall if appropriate provide each landowner or operator of an irrigation system with current information available with respect to fertilizer and chemical usage for the specific soil types present and cropping patterns used.

Source: Laws 1986, LB 894, § 17; Laws 1991, LB 51, § 16; Laws 1993, LB 3, § 27.
Effective date September 9, 1993.

Article 10.—GROUNDWATER MANAGEMENT DISTRICTS

Law Review and Bar Journal References:

"Water Law—Kansas Water Appropriation Act—Water May Not Be Appropriated Without the Approval of the Chief Engineer," Gary H. Hanson, 31 K.L.R. 342, 348 (1983).

"The Constitutionality of the Kansas Groundwater Antiexportation Statute," Galen M. Buller, 31 K.L.R. 429, 444 (1983).

"Groundwater Pollution I: The Problem and the Law," Robert L. Glicksman, George Cameron Coggins, 35 K.L.R. 75, 145 (1986).

"High Noon on the Ogallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone," Myrl L. Duncan, 27 W.L.J. 16, 51 (1987).

"Legal Aspects of Kansas Water Resources Planning," John C. Peck and Doris K. Nagel, 37 K.L.R. 199 (1989).

82a-1001 to 82a-1019.

History: L. 1968, ch. 403, §§ 1 to 19; Repealed, L. 1972, ch. 386, § 17; July 1.

82a-1020. Legislative declaration. It is hereby recognized that a need exists for the creation of special districts for the proper management of the groundwater resources of the state; for the conservation of groundwater resources; for the prevention of economic deterioration; for associated endeavors within the state of Kansas through the stabilization of agriculture; and to secure for Kansas the benefit of its fertile soils and favorable location with respect to national and world markets. It is the policy of this act to preserve basic water use doctrine and to establish the right of local water users to determine their destiny with respect to the use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas. It is, therefore, declared that in the public interest it is necessary and advisable to permit the establishment of groundwater management districts.

History: L. 1972, ch. 386, § 1; July 1.

Law Review and Bar Journal References:

Note on the water depletion deduction in Kansas, 25 K.L.R. 453, 460 (1977).

"Kansas Water Rights: More Recent Developments," Arno Windscheffel, 47 J.B.A.K. 217, 222 (1978).

"Kansas Groundwater Management Districts," John C. Peck, 29 K.L.R. 51, 52, 54, 62, 66 (1980).

"Kansas Water Appropriation Statutes and the Oil and Gas Industry in Kansas," Eva N. Neufeld, 50 J.B.A.K. 43, 50 (1981).

"Riparian Property Rights: Kansas Law of Riparian Ownership," Blaise R. Plummer, 21 W.L.J. 96, 97 (1981).

"Legal Constraints on Diverting Water from Eastern Kansas to Western Kansas," John C. Peck, 30 K.L.R. 160, 167, 168, 175, 202, 206, 211, 212 (1982).

"Groundwater Pollution I: The Problem and the Law," Robert L. Glicksman, George Cameron Coggins, 35 K.L.R. 75, 145 (1986).

"High Noon on the Ogallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone," Myrl L. Duncan, 27 W.L.J. 16, 52, 64, 77, 92 (1987).

Attorney General's Opinions:

Groundwater management district; eligible voter. 89-3.

Groundwater management district powers; annual assessment against landowners; reduction of district; disposition of funds. 89-23.

CASE ANNOTATIONS

1. Cited in holding Water Appropriation Act does not violate constitutional requirements for taking of property. F. Arthur Stone & Sons v. Gibson, 230 K. 224, 236, 239, 630 P.2d 1154 (1981).

82a-1021. Definitions. The following terms when used in this act shall have the limitations and meanings respectively ascribed to them in this section:

(a) "Aquifer" means any geological formation capable of yielding water in sufficient quantities that it can be extracted for beneficial purposes.

(b) "Board" means the board of directors constituting the governing body of a groundwater management district.

(c) "Chief engineer" means the chief engineer of the division of water resources of the Kansas state board of agriculture.

(d) "District" means a contiguous area which overlies one or more aquifers, together with any area in between, which is organized for groundwater management purposes under this act and acts amendatory thereof or supplemental thereto.

(e) "Eligible voter" means any person who is a landowner or a water user as defined in this act except as hereafter qualified. Every natural person of the age of eighteen (18) years or upward shall be an eligible voter of a district under this act if (1) he or she is a landowner who owns, of record, any land, or any interest in land, comprising forty (40) or more contiguous acres located within the boundaries of the district and not within the corporate limits of any municipality, or (2) he or she withdraws or uses groundwater from within the boundaries of the district in an amount of one acre-foot or more per year.

Except as is hereafter qualified, every public or private corporation shall be an eligible voter of a district under this act either (1) if it is a landowner who owns of record any land, or any interest in land, comprised of forty (40) or more contiguous acres located within the boundaries of the district and not within the corporate limits of any municipality, or (2) if it is a corporation that withdraws groundwater

from within the district in an amount of one acre-foot or more per year.

Each tract of land of forty (40) or more contiguous acres and each quantity of water withdrawn or used in an amount of one acre-foot or more per year shall be represented by but a single eligible voter. If the land is held by lease, under an estate for years, under contract, or otherwise, the fee owner shall be the one entitled to vote, unless the parties in interest agree otherwise. If the land is held jointly or in common, the majority in interest shall determine which natural person or corporation shall be entitled to vote. Each qualified voter shall be entitled to cast only one vote. A person duly authorized to act in a representative capacity for estates, trusts, municipalities, public corporations or private corporations may also cast one vote for each estate, trust, municipality, or public or private corporations so represented. Nothing herein shall be construed to authorize proxy voting.

Any landowner who is not a water user may have his or her land excluded from any district assessments and thereby abandon his or her right to vote on district matters by serving a written notice of election of exclusion with the steering committee or the board. Such a landowner may again become an eligible voter by becoming a water user or by serving a written notice of inclusion on the board stating that he or she has elected to be reinstated as a voting member of the district and will be subject to district assessments.

Any eligible voter who is a landowner or water user as defined in this act, and also is the owner of a tract or tracts of land comprising not less than six hundred forty (640) acres in area, located within the boundaries of the district, on which no water is being used or from which no water is being withdrawn, may have such tract or tracts of land on or from which no water is used or withdrawn, excluded from district assessment in the manner described above.

All notices of inclusion or exclusion of land shall be submitted to the board not later than January 1 of the effective year.

(f) "Land" means real property as that term is defined by the laws of the state of Kansas.

(g) "Landowner" means the person who is the record owner of any real estate within the boundaries of the district or who has an interest therein as contract purchaser of forty (40) or more contiguous acres in the district not within the corporate limits of any municipality. Owners of oil leases, gas leases, mineral rights, easements, or mortgages shall not be considered landowners by reason of such ownership.

(h) "Management program" means a written report describing the characteristics of the district and the nature and methods of dealing with groundwater supply problems within the district. It shall include information as to the groundwater management program to be undertaken by the district and such maps, geological information, and other data as may be necessary for the formulation of such a program.

(i) "Person" means any natural person, private corporation, or municipality, or other public corporation.

(j) "Water right" shall have the meaning ascribed to that term in K.S.A. 82a-701, and any acts amendatory thereof or supplemental thereto.

(k) "Water user" means any person who is withdrawing or using groundwater from within the boundaries of the district in an amount not less than one acre-foot per year. If a municipality is a water user within the district, it shall represent all persons within its corporate limits who are not water users as defined above.

History: L. 1972, ch. 386, § 2; July 1.

Attorney General's Opinions:

Groundwater management districts; imposition of annual assessments on unified school district. 80-96.

Groundwater management districts; definition of landowner. 80-171.

Groundwater management districts; budget law inapplicable. 82-220.

No incompatibility for director of groundwater management district serving as legislator. 84-59.

Groundwater management districts; annual meetings of eligible voters; affidavits of eligibility to vote; certain records not required to be open; information of a personal nature; board of directors; qualifications. 85-48.

Groundwater management districts; definitions; eligible voters, water users, tract. 85-58.

Groundwater management districts; definitions; eligible voter. 85-59.

Definitions; participating member. 85-136.

Bond elections; suffrage; qualifications of electors. 87-72.

Groundwater management district; eligible voter. 89-3.

Groundwater management district powers; annual assessment against landowners; reduction of district; disposition of funds. 89-23.

82a-1022. Organization of district; steering committee; declaration of intent filing; map of proposed district, submission and approval by chief engineer. Proceedings to organize a groundwater management district shall be commenced by filing with the chief

engineer a declaration of intent to form a district, signed by not less than fifteen (15) eligible voters of the proposed district. The seven (7) eligible voters first signing the declaration shall be the steering committee of the proposed district. The person first signing the declaration shall be chairman of the steering committee, and the second signer shall be the secretary. At the time of filing the declaration of intent, the steering committee shall also submit to the chief engineer a map of the proposed district. The chief engineer shall, in consultation with the steering committee, make any necessary modifications in the map of the proposed district so that, in the opinion of the chief engineer, a manageable area will result. After such modifications are made, the chief engineer shall certify to the steering committee, a description of the lands to be included within the proposed district.

History: L. 1972, ch. 386, § 3; July 1.

82a-1023. Same; petition contents and signatures; filing with secretary of state. (a) Within twelve (12) months after certification of the description of the lands to be included within the proposed district, and before any groundwater management district shall be organized, a petition shall be circulated by the steering committee and filed with the secretary of state after being signed by not less than fifty (50) eligible voters or fifty percent (50%) of the eligible voters of the district, whichever is the smaller.

(b) The petition shall set forth:

(1) The proposed name of the district, which name shall end with the words "groundwater management district No. _____." It shall be the duty of the secretary of state to assign a number to each such district in the order in which petitions for organizations are received in his or her office.

(2) A description of the lands to be included within the proposed district identified by township, range, and section numbers and fractions thereof, and other areas as appropriate and a map showing the contiguous lands to be included in the district.

(3) A statement of the purposes for which the district is to be organized.

(4) A statement of the number of persons that will constitute the elected board of directors of the district, which shall be an uneven number of not less than three (3) or more than fifteen (15).

(5) The names and addresses of the persons who constitute the steering committee.

(6) A prayer for the organization and incorporation of the district.

(7) Any other matter deemed essential by the steering committee.

(c) The petition shall be in substantially the following form:

"Before the secretary of state of the state of Kansas in the matter of the proposed _____ groundwater management district No. _, in _____county, (counties), Kansas.

PETITION

"Come now the undersigned persons and state that (1) they are eligible voters of the aforenamed groundwater management district, hereinafter more fully described; (2) each signer's post-office address is set forth beside his or her name; (3) the purposes for which this district is organized are: (statement of purposes); (4) a seven-member steering committee for the organization of the district has been established; (5) the names of persons who serve on the steering committee, of which the first named shall be chairman, and their respective addresses are as follows: (list of names and addresses); and (6) the governing body of the district shall be an elected board of directors composed of _____ eligible voters.

"Attached hereto, marked exhibit A and made a part hereof, is a description of the lands proposed to be included in the district.

"Attached hereto, marked exhibit B and made a part hereof, is a map showing the lands proposed to be included in the district.

"Wherefore, the undersigned individually and collectively pray that a groundwater management district be organized in the manner provided by law for the purposes set forth herein, and that the secretary of state and the chief engineer of the division of water resources of the Kansas state board of agriculture proceed diligently in the performance of their duties so that the organization and incorporation of this proposed district may be completed and approved at the earliest possible time.

"Submitted to the secretary of state this _____ day of _____, 19_____."

History: L. 1972, ch. 386, § 4; L. 1974, ch. 454, § 1, July 1.

Law Review and Bar Journal References:

"Kansas Groundwater Management Districts," John C. Peck, 29 K.L.R. 51, 53 (1980).

Attorney General's Opinions:

Groundwater management districts; annual meetings of eligible voters; affidavits of eligibility to vote; certain records not required to be open; information of a personal nature; board of directors; qualifications. 85-48.

82a-1024. Same; determination of sufficiency of petition; approval by chief engineer; criteria for approval. (a) If the secretary of state finds the petition to be sufficient as to form and substance and executed in accordance with the requirements of this act he or she shall transmit a certified copy of the petition to the chief engineer within five (5) days from the date of his or her determination of suffi-

ciency. Upon receipt of the certified copy, the chief engineer shall review the petition and shall within ninety (90) days after receipt of the copy transmit a written report of his or her findings on the petition, together with his or her written approval or disapproval of the petition, to the secretary of state and the chairman of the steering committee named in the petition.

(b) The chief engineer shall approve such petition if he or she finds that:

(1) The lands proposed to be included in the district substantially comprise a hydrologic community of interest.

(2) The proposed district would not include any of the lands of an existing groundwater management district.

(3) The statement of purposes contained in the petition conforms with the intent and purposes of this act.

(4) The lands within the proposed district or part thereof overlie an aquifer or aquifers subject to management.

(5) The map attached to the petition is substantially correct.

(6) The area of the district and existing and prospective uses of groundwater within the district are sufficient to support a groundwater management program.

(7) The public interest will be served by the creation of the proposed district.

(c) The chief engineer in his or her findings may make minor corrections with respect to the map and the corrections shall become a part of the petition and shall be deemed effective without a recirculation of the corrected petition.

(d) If the chief engineer approves the petition, he or she shall transmit a certified copy of his or her report to the secretary of state and to the chairman of the steering committee of the district.

History: L. 1972, ch. 386, § 5; July 1.

82a-1025. Same; election for approval of organization of district; secretary of state to issue certificate of incorporation, when; action to attack legality. (a) Within ten (10) days after receipt of a certified copy of the chief engineer's report approving the petition, or the petition as amended, the chairman of the steering committee shall call a meeting of the committee. The committee shall meet at the time and place fixed in the notice and shall provide by resolution for the calling of an election at which all eligible voters of the district shall be entitled to vote on the question of whether the district should be organized in accordance with the petition as approved by the chief engineer. The steering committee shall cause a notice of the election to be published once each week for three (3) consecutive weeks in a newspaper or newspapers of general circulation within the proposed district, the first publication to be not less than twenty-eight (28) days prior to such election. If the proposed district lies in more than one county, a similar notice shall be published in a newspaper of general circulation in each of the counties in which a part of the proposed district is located. The notice shall set forth when and where the election shall be held and the proposition to be voted on. It shall contain a copy of the petition as approved by the chief engineer (omitting the map attached as an exhibit) and shall be signed by the chairman and attested by the secretary of the steering committee. The steering committee shall conduct the election, canvass the vote, and certify the results to the secretary of state.

(b) If a majority of the votes cast are in favor of the organization and creation of the district, the secretary of state shall issue to the steering committee a certificate of incorporation for the district, which shall be filed of record in the office of the register of deeds of each county in which all or a portion of the district lies. Upon such recordation, the district shall be authorized to function in accordance with the provisions of this act.

(c) If a majority of those voting on the proposition vote against the organization and creation of the district, the secretary of state shall endorse that fact on the face of the petition and the proceedings shall be closed.

(d) No action attacking the legality of the incorporation of any groundwater management district organized under this act shall be maintained unless commenced within ninety (90) days after the issuance of the certificate of incorporation for a district by the secretary of state, and any alleged illegality of the incorporation of any district shall not be interposed as a defense to any action brought after that time.

History: L. 1972, ch. 386, § 6; July 1.

Attorney General's Opinions:

Groundwater management districts; annual meetings of eligible voters; affidavits of eligibility to vote; certain records not required to be open; information of a personal nature; board of directors; qualifications. 85-48.

82a-1026. Annual meetings of eligible voters; organization meeting to elect initial board of directors. (a) Within not more than ninety (90) days after the recording of the certificate of incorporation, a meeting open to all eligible voters of the district shall be held by the steering committee for the election of the initial board of directors of the district. A notice of the meeting shall be given by the steering committee at least ten (10) days prior to the date thereof by one publication in a newspaper of general circulation in each of the counties of which the groundwater management district is a part. Each eligible voter of the district shall be entitled to vote for as many candidates as the number of directors that are to be elected, but may not cast more than one vote for any one candidate. The candidates receiving the greatest number of votes cast shall respectively be declared elected.

(b) In not more than twelve (12) months after the initial meeting, and annually thereafter, a meeting shall be held for the election of directors whose terms expire, to report on the financial condition and activities of the district and to adopt a proposed budget covering the anticipated expenses of the district for the ensuing year.

(c) The number of directors of a district, or the date of the annual meeting, may be changed at any annual meeting if notice of the proposition or propositions is included in the notice of the annual meeting at which the changes are to be considered.

History: L. 1972, ch. 386, § 7; L. 1978, ch. 436, § 1; July 1.

Law Review and Bar Journal References:

"Kansas Groundwater Management Districts," John C. Peck, 29 K.L.R. 51, 53 (1980).

Attorney General's Opinions:

No incompatibility for director of groundwater management district serving as legislator. 84-59.

82a-1027. Board of directors; terms of members; expenses; officers; quorum; vote for actions; filling vacancies. (a) All powers granted to a groundwater management district under the provisions of this act shall be exercised by an elected board of directors which shall be composed of the number of persons specified in the petition. Each director shall serve for a period of three (3) years and until his or her successor is duly elected and qualified, except that as nearly as possible one-third of the original directors shall serve for a term of one (1) year, one-third shall serve for a term of two (2) years, and one-third shall serve for a term of three (3) years. The directors shall serve without compensation but shall be allowed actual and necessary expenses incurred in the performance of their official duties.

(b) The board of directors, after being duly elected, shall elect from its number a president, a vice-president, a secretary, and a treasurer. In districts having only three (3) directors, the board shall elect one director to hold the offices of secretary and treasurer.

(c) A majority of the directors shall constitute a quorum for the transaction of business and a majority of those voting shall determine all actions taken by the board. In the absence of any of the duly elected officers, those directors present at any meeting may select a director to act as an officer pro tem.

(d) The elected board shall fill any vacancy occurring on the board prior to the expiration of the term of any director by selecting a replacement from among the eligible voters of the district to serve for the unexpired term.

History: L. 1972, ch. 386, § 8; July 1.

Attorney General's Opinions:

Official public records act applies to groundwater management districts. 83-1.

No incompatibility for director of groundwater management district serving as legislator. 84-59.

Groundwater management districts; annual meetings of eligible voters; affidavits of eligibility to vote; certain records not required to be open; information of a personal nature; board of directors; qualifications. 85-48.

82a-1028. District powers; home office. Every groundwater management district organized under this act shall be a body politic and corporate and shall have the power to:

(a) Adopt a seal;

(b) sue and be sued in its corporate name;

(c) rent space, maintain and equip an office, and pay other administrative expenses;

(d) employ such legal, engineering, technical, and clerical services as may be deemed necessary by the board;

(e) purchase, hold, sell and convey land, water rights and personal property, and execute such contracts as may, in the opinion of the board, be deemed necessary or convenient;

(f) acquire land and interests in land by gift, exchange or eminent domain, the power of eminent domain to be exercised within the boundaries of the district in like manner as provided by K.S.A. 26-501 to 26-516, inclusive, and any acts amendatory thereof or supplemental thereto, except that any land holdings acquired pursuant hereto or in accordance with the provisions of the next preceding subsection shall not in the aggregate

exceed one thousand (1,000) acres. In any case where a district has land holdings in excess of the described limitation, the district shall dispose of such excess in a reasonable and expeditious manner;

(g) construct, operate and maintain such works as may be determined necessary for drainage, recharge, storage, distribution or importation of water, and all other appropriate facilities of concern to the district;

(h) levy water user charges and land assessments, issue general and special bonds and incur indebtedness within the limitations prescribed by this act;

(i) contract with persons, firms, associations, partnerships, corporations or agencies of the state or federal government, and enter into cooperative agreements with any of them;

(j) take appropriate actions to extend or reduce the territories of the district as prescribed by this act;

(k) construct and establish research, development, and demonstration projects, and collect and disseminate research data and technical information concerning the conservation of groundwater;

(l) install or require the installation of meters, gauges, or other measuring devices and read or require water users to read and report those readings as may be necessary to determine the quantity of water withdrawn;

(m) provide advice and assistance in the management of drainage problems, storage, groundwater recharge, surface water management, and all other appropriate matters of concern to the district;

(n) adopt, amend, promulgate, and enforce by suitable action, administrative or otherwise, reasonable standards and policies relating to the conservation and management of groundwater within the district which are not inconsistent with the provisions of this act or article 7 of chapter 82a of the Kansas Statutes Annotated, and all acts amendatory thereof or supplemental thereto;

(o) recommend to the chief engineer rules and regulations necessary to implement and enforce the policies of the board. Such rules and regulations shall be of no force and effect unless and until adopted by the chief engineer to implement the provisions of article 7 of chapter 82a of the Kansas Statutes Annotated, and all acts amendatory thereof or supplemental thereto. All such regulations adopted shall be effective only within a specified district;

(p) enter upon private property within the district for inspection purposes, to determine conformance of the use of water with established rules and regulations, including measurements of flow, depth of water, water wastage and for such other purposes as are necessary and not inconsistent with the purposes of this act;

(q) select a residence or home office for the groundwater management district which shall be at a place in a county in which the district or any part thereof is located and may be either within or without the boundaries of the district. The board shall designate the county in which the residence or home office is located as the official county for the filing of all official acts and assessments;

(r) seek and accept grants or other financial assistance that the federal government and other public or private sources shall make available and to utilize the same to carry out the purposes and functions of the district; and

(s) recommend to the chief engineer the initiation of proceedings for the designation of a certain area within the district as an intensive groundwater use control area.

History: L. 1972, ch. 386, § 9; L. 1978, ch. 436, § 2; L. 1978, ch. 437, § 1; July 1.

Law Review and Bar Journal References:

Note on the water depletion deduction in Kansas, 25 K.L.R. 453, 460 (1977).

"Kansas Groundwater Management Districts," John C. Peck, 29 K.L.R. 51, 53, 60, 62, 64, 67, 68 (1980).

"High Noon on the Ogallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone," Myrl L. Duncan, 27 W.L.J. 16, 52 (1987).

"Legal Aspects of Kansas Water Resources Planning," John C. Peck and Doris K. Nagel, 37 K.L.R. 199 (1989).

Attorney General's Opinions:

Groundwater management districts; budget law inapplicable. 82-220.

No incompatibility for director of groundwater management district serving as legislator. 84-59.

Groundwater management districts; definitions; eligible voters, water users, tract. 85-58.

Groundwater management district powers; annual assessment against landowners; reduction of district; disposition of funds. 89-23.

82a-1029. Management program; board of directors' and chief engineer's functions and duties; hearings; approval and adoption; periodic review. Before undertaking active management of the district the board shall prepare a management program. Upon completion of the management program the board shall transmit a copy to the chief engineer with a request for his or her approval. The chief engineer shall examine and study the management program

and, if he or she finds that it is compatible with article 7 of chapter 82a of the Kansas Statutes Annotated, and all acts amendatory thereof or supplemental thereto and any other state laws or policies, he or she shall approve it and notify the board of his or her action. When the management program is approved by the chief engineer, the board shall fix a time and place either within or conveniently near the district for a public hearing upon the management program. A notice of the hearing shall be given by one publication in a newspaper or newspapers of general circulation within the district, at least twenty-eight (28) days prior to the date fixed for the hearing, setting forth the time and place of the hearing. The notice shall state that a copy of the management program is available for public inspection in the office of the secretary of the district. Any person desiring to be heard in the matter must file, in duplicate, with the board at its office at least five (5) days before the date of the hearing a written statement of his or her intent to appear at the hearing and the substance of the testimony he or she wishes to present. Upon receipt of any such statements, the board shall immediately transmit one copy of the statements to the chief engineer. The chief engineer or his or her duly appointed representative shall attend the hearing. At the hearing any person who has duly filed his or her written statement shall be heard and may present information in support of his or her position in the matter. After hearing and considering all relevant testimony and information, the board shall by resolution adopt, modify, or reject the management program. The board shall then notify the chief engineer of its action. If it is determined that the management program should be modified, any proposed changes approved by the board shall be incorporated in a modified management program which shall be submitted to the chief engineer for further consideration. The chief engineer shall review the modified management program and shall transmit a supplemental written report of the results of his or her study and investigation to the board, including his or her written approval or disapproval of the modified management program. If the modified management program is approved by the chief engineer, the board shall by resolution adopt it as the official management program of the district and notify the chief engineer of its action. The board shall periodically and at least once each year review the officially adopted management program. Following that review, they shall either reaffirm its adoption or propose that it be revised. If it is proposed that the management program be revised, the board shall follow the same procedure towards adoption of a revised management program as is prescribed above for the preparation, approval, and adoption of the original management program.

History: L. 1972, ch. 386, § 10; July 1.

Law Review and Bar Journal References:

"Groundwater Pollution I: The Problem and the Law," Robert L. Glicksman, George Cameron Coggins, 35 K.L.R. 75, 145 (1986).

Attorney General's Opinions:

Groundwater management districts; definitions; eligible voters, water users, tract. 85-58.

82a-1030. Water user charges; annual assessment per acre against landowners; budget; collection by county officers; annual audit; no-fund warrants; limitation; protest petition; redemption of warrants. (a) In order to finance the operations of the district, the board may assess an annual water user charge against every person who withdraws groundwater from within the boundaries of the district. The board shall base such charge upon the amount of groundwater allocated for such person's use pursuant to his or her water right. Such charge shall not exceed sixty cents (60¢) for each acre-foot (325,851 gallons) of groundwater withdrawn within the district or allocated by the water right. Whenever a person shows by the submission to the board of a verified claim and any supportive data which may be required by the board that his or her actual annual groundwater withdrawal is in a lesser amount than that allocated by the water right of such person, the board shall assess such annual charge against such person on the amount of water shown to be withdrawn by the verified claim. Any such claim shall be submitted by April 1 of the year in which such annual charge is to be assessed. The board may also make an annual assessment against each landowner of not to exceed five cents (5¢) for each acre of land owned within the boundaries of the district. Special assessments may also be levied, as provided hereafter, against land specially benefited by a capital improvement without regard to the limits prescribed above.

(b) Before any assessment is made, or user charge imposed, the board shall submit the proposed budget for the ensuing year to the eligible voters of the district at a hearing called for that purpose by one (1) publication in a

newspaper or newspapers of general circulation within the district at least twenty-eight (28) days prior to the meeting. Following the hearing, the board shall, by resolution, adopt either the proposed budget or a modified budget and determine the amount of land assessment or user charge, or both, needed to support such budget.

(c) Both the user charges assessed for groundwater withdrawn and the assessments against lands within the district shall be certified to the proper county clerks and collected the same as other taxes in accordance with K.S.A. 79-1801, and acts amendatory thereof or supplemental thereto, and the amount thereof shall attach to the real property involved as a lien in accordance with K.S.A. 79-1804, and acts amendatory thereof or supplemental thereto. All moneys so collected shall be remitted by the county treasurer to the treasurer of the groundwater management district who shall deposit them to the credit of the general fund of the district. The accounts of each groundwater management district shall be audited annually by a public accountant or certified public accountant.

(d) Subsequent to the certification of approval of the organization of a district by the secretary of state and the election of a board of directors for such district, such board shall be authorized to issue no-fund warrants in amounts sufficient to meet the operating expenses of the district until money therefor becomes available pursuant to user charges or assessments under subsection (a). In no case shall the amount of any such issuance be in excess of twenty percent (20%) of the total amount of money receivable from assessments which could be levied in any one year as provided in subsection (a). No such warrants shall be issued until a resolution authorizing the same shall have been adopted by the board and published once in a newspaper having a general circulation in each county within the boundaries of the district. Whereupon such warrants may be issued unless a petition in opposition to the same, signed by not less than ten percent (10%) of the eligible voters of such district and in no case by less than twenty (20) of the eligible voters of such district, is filed with the county clerk of each of the counties in such district within ten (10) days following such publication. In the event such a petition is filed, it shall be the duty of the board of such district to submit the question to the eligible voters at an election called for such purpose. Such election shall be noticed and conducted as provided by K.S.A. 82a-1031.

Whenever no-fund warrants are issued under the authority of this subsection, the board of directors of such district shall make an assessment each year for three (3) years in approximately equal installments for the purpose of paying such warrants and the interest thereon. All such assessments shall be in addition to all other assessments authorized or limited by law. Such warrants shall be issued, registered, redeemed and bear interest in the manner and in the form prescribed by K.S.A. 79-2940, except they shall not bear the notation required by said statute and may be issued without the approval of the state board of tax appeals. Any surplus existing after the redemption of such warrants shall be handled in the manner prescribed by K.S.A. 79-2940.

History: L. 1972, ch. 386, § 11; L. 1976, ch. 440, § 1; L. 1978, ch. 436, § 3; July 1.

Attorney General's Opinions:

Groundwater management districts; imposition of annual assessments on unified school district. 80-96.

Groundwater management districts; definition of landowner. 80-171.

Groundwater management districts; budget law inapplicable. 82-220.

Groundwater management districts; definitions; eligible voters, water users, tract. 85-58.

Groundwater management district powers; annual assessment against landowners; reduction of district; disposition of funds. 89-23.

82a-1031. General improvement bonds; special assessment improvement bonds; combination improvement bonds; elections for approval of issuance of bonds. (a) If the board by resolution provides that all or any part of the capital cost of works of improvement within the district is to be paid by the issuance of general improvement bonds of the entire district, it shall be the duty of the board to submit the question of approval of the bond issue to the eligible voters of the district. Notice of the time, place and purpose for which the election is to be held shall be given by one publication in a newspaper or newspapers of general distribution within the district at least twenty-eight (28) days prior to the date fixed for the election. Except as hereinbefore provided, the election shall be held and conducted by the board in the manner prescribed for conducting and holding the election for the organization of the district.

(b) If the board by resolution provides that all or any part of the capital cost of works of improvement is to be paid by the issuance of

improvement bonds to be funded by special assessment against the lands specially benefited by a project, the board shall proceed to determine the particular lands within the district upon which special assessments are to be levied and it shall be the duty of the board to submit the question of approval of the bond issue to an election of the owners of those lands. Notice of the time and place and the purpose for which the election is to be held shall be given by one publication in a newspaper or newspapers of general circulation within the district at least twenty-eight (28) days prior to the date of the election. Except as hereinbefore provided, the election shall be held and conducted in the manner prescribed in subsection (a) of this section. If it is proposed to issue improvement bonds to be paid partially by the entire district and partially by lands specially benefited, it shall be the duty of the board of directors to submit each question for approval separately.

History: L. 1972, ch. 386, § 12; July 1.

Attorney General's Opinions:
Groundwater management districts; definition of landowner. 80-171.

82a-1032. Works paid from special assessments; determination of benefits and assessments; levy of assessments; collections by county officers; bonds for not to exceed 20 year term. If a resolution of the board provides that all or any part of the cost of the works contemplated is to be paid by special assessment against lands specially benefited by a project, the board shall appoint three (3) disinterested appraisers who shall recommend apportionment of the special assessment to the tracts of land subject to the special assessment. The appraisers shall have access to all available engineering reports and data pertaining to the works contemplated and may request additional engineering data or counsel necessary to carry out their duties. The appraisers shall take an oath to appraise fairly and impartially the benefits accruing to each tract of land and shall recommend the apportionment of assessment according to the relative benefits to be received by the several tracts of land subject to assessment. They shall make a written report of their findings to the board. Upon receiving the report, the board shall prepare a resolution which shall contain a list of the tracts of land found to be specially benefited and the amount of assessment to be levied against each tract. No assessment so specified against any tract of land shall exceed the estimated benefits to the land by the project. Each tract of land shall be legally described and the name of its owner or owners shall be set forth beside the description of each tract listed. After adopting the resolution, the board shall fix a time and place for hearing any complaint that may be made as to the estimated benefit to any tract of land appraised and a notice of the hearing shall be given by the board by one publication in a newspaper or newspapers of general circulation within the district at least ten (10) days prior to the date set for the hearing. The board at the hearing may alter the estimated benefit to any tract of land if, in its judgment, the benefit has been appraised too high or too low. The board shall immediately thereafter pass a resolution fixing the benefit to be assigned to each tract of land and providing for the benefit assessment thereof, which sum may be spread equally over a period of not to exceed twenty (20) years. The board shall immediately thereafter mail a written notice of the assessment to the owner or owners of each tract of land. The notice shall state that if the assessment is not paid in full within thirty (30) days from the date of notice, bonds will be issued and an assessment will be levied annually against the tract of land for a period of not to exceed twenty (20) years in an amount sufficient to pay the total assessment plus the interest due on the bonds. No action to set aside the assessment shall be maintained unless commenced within ninety (90) days from the date of the notice. The amount assessed against each tract of ground to pay for the special assessment bonds falling due each year and the interest thereon shall be levied, certified to the proper county clerk, and collected the same as other taxes.

History: L. 1972, ch. 386, § 13; July 1.

Attorney General's Opinions:
Groundwater management districts; definition of landowner. 80-171.
Groundwater management district powers; annual assessment against landowners; reduction of district; disposition of funds. 89-23.

82a-1033. Extension or reduction of district territory by chief engineer, upon petition; hearing; filing of order. (a) The chief engineer shall have the power, upon proper petition being presented by the board for that purpose, to extend or reduce the territory of any groundwater management district organized and incorporated under the provisions of this act. The petition to extend or reduce the ter-

ritory of any groundwater management district shall be addressed to the chief engineer and shall:

(1) Describe the territory to be annexed or removed by township, range and section numbers and fraction thereof and other platted areas as appropriate.

(2) Have a map attached thereto as an exhibit, and incorporated therein by reference, showing the district and the lands proposed to be annexed or removed.

(3) Show that the proposed extension or reduction of territory has been recommended by the district concerned by resolution duly adopted by its board.

(b) The chief engineer shall fix a time for a hearing upon the petition and the district shall give notice thereof for three (3) consecutive weeks in a newspaper or newspapers of general circulation within the district, the first publication to be at least twenty-eight (28) days before the day fixed for the hearing. The notice shall state the name and general location of the district and describe the lands proposed to be annexed or removed. It shall state that a hearing will be held on whether the petition of the district should be approved. It shall state the day, hour, and place of the hearing, which shall be at a suitable location, and that all persons may appear before the chief engineer at the hearing and be heard. If, after the hearing, the chief engineer finds that the area proposed to be annexed or removed meets other requirements as prescribed for the organization of a district, he or she shall approve the petition and fix the time when the annexation or reduction of territory shall become effective. A certified copy of his or her order approving the petition shall be sent to the board of directors and to the secretary of state. The board of directors shall file a copy of the order for record in the office of the register of deeds of each county in which the district, as modified, or any part thereof lies.

History: L. 1972, ch. 386, § 14; July 1.

Attorney General's Opinions:

Groundwater management district powers; annual assessment against landowners; reduction of district; disposition of funds. 89-23.

82a-1034. District dissolution. (a) Whenever the board of a groundwater management district organized and incorporated under the provisions of this act finds reasons for the dissolution of the district, the board may, by resolution adopted by a two-thirds vote of all members of the board at a special meeting of the board called for that purpose, notice of which shall specify the purpose for which the meeting is to be called, provide for the calling of an election of the eligible voters of the district for the purpose of determining whether the district shall be dissolved. The board shall also provide for the calling of an election if written petitions therefor, signed by twenty percent (20%) of the eligible voters of the district, are filed with the secretary of the board. The election to determine whether the district shall be dissolved shall be held and conducted by the board in the same manner as provided for conducting the election for the organization of the district insofar as those provisions can be made applicable. If a majority of the votes cast are in favor of dissolution of the district, the board shall immediately certify the results of the election to the secretary of state who shall thereupon issue and deliver to the secretary of the board a certificate of dissolution.

(b) Upon receipt from the secretary of state of the certificate of dissolution of a groundwater management district under the provisions of this act, the secretary of the board shall notify the board of the certification and the board shall immediately pay all obligations of the district, including all costs incurred by the district, the chief engineer and the secretary of state in regard to the dissolution proceedings. The treasurer of the board shall thereupon distribute all moneys in his or her hands belonging to the district in the manner prescribed by this act and immediately after making the distribution the treasurer shall notify the secretary of the board of the distribution. Upon receipt of the notification the secretary of the board shall have the certificate of dissolution published once in a newspaper or newspapers of general circulation within the district and proof of the publication shall be filed in the office of the secretary of state. The effective date of the dissolution, unless otherwise provided, shall be the date on which the proof of publication is filed in the office of the secretary of state, but in no event shall the date of dissolution be a date prior to the date of the publication of the certificate of dissolution. A certified copy of the certificate of dissolution of the district shall also be recorded in the office of the county clerk of each county where any portion of the dissolved district was located.

(c) Any funds or other assets of a groundwater management district which has been dissolved under the provisions of this act shall be

apportioned and paid to the general fund of any county located within or partially within the district in the proportion which the assessed valuation of the property in the district located within the county bears to the total assessed valuation of the district, based on equalized assessed valuations for the preceding year. The treasurer of the district, upon notification of receipt of the certificate of dissolution, shall immediately pay the amounts due each county located within the district to the treasurer of the county.

(d) The secretary of the board of any groundwater management district which has been dissolved under the provisions of this act shall file all minutes and records of the district with the register of deeds of the county where the designated office of the district was located.

History: L. 1972, ch. 386, § 15, July 1.

Attorney General's Opinions:

Groundwater management district powers; annual assessment against landowners; reduction of district; disposition of funds. 89-23.

82a-1035. Payment of expenses of defeated proposed district organization. If the organization of a proposed district is defeated at the election or if the petition is disapproved by the secretary of state or the chief engineer, the steering committee named in the petition shall continue to function in a limited capacity for the purposes set out below. The steering committee shall determine the amount of money necessary to pay all of the costs and expenses incurred in the preparation and filing of the petition and in the conduct of the election and shall themselves assume the obligation for the first two hundred dollars ($200) of the costs. If the cost is more than that amount they shall certify a statement of the amount to the county clerk of each county in which the proposed district was to be located. The county clerks shall ascertain the total assessed valuation of all taxable tangible property in their respective counties within the proposed district and certify this amount to the county clerk of the county in which the chairman of the steering committee of the proposed district resides. The county clerk shall determine the levy necessary to be assessed against the taxable tangible property in the entire proposed district in order to raise funds sufficient to pay the amount set forth in the statement and shall certify the levy to the county clerks of the other counties in which a portion of the proposed district is located. Each of the county clerks shall then cause the levy to be made against the taxable tangible property lying within the boundaries of the proposed district within his or her county. The county treasurers of the respective counties involved shall remit the funds raised by the levy in their counties to the county treasurer of the county in which the chairman of the steering committee resides, who shall hold the funds and shall honor warrants drawn upon the funds by the chairman of the steering committee and countersigned by the secretary of the steering committee in payment of the costs and expenses incurred in the proposed organization of the district and shown on the statement of expenses.

History: L. 1972, ch. 386, § 16; July 1.

82a-1036. Initiation of proceedings for designation of intensive groundwater use control areas; duties of chief engineer; findings. Whenever a groundwater management district recommends the same or whenever a petition signed by not less than three hundred (300) or by not less than five percent (5%) of the eligible voters of a groundwater management district, whichever is less, is submitted to the chief engineer, the chief engineer shall initiate, as soon as practicable thereafter, proceedings for the designation of a specifically defined area within such district as an intensive groundwater use control area. The chief engineer upon his or her own investigation may initiate such proceedings whenever said chief engineer has reason to believe that any one or more of the following conditions exist in a groundwater use area which is located outside the boundaries of an existing groundwater management district: (a) Groundwater levels in the area in question are declining or have declined excessively; or (b) the rate of withdrawal of groundwater within the area in question equals or exceeds the rate of recharge in such area; or (c) preventable waste of water is occurring or may occur within the area in question; (d) unreasonable deterioration of the quality of water is occurring or may occur within the area in question; or (e) other conditions exist within the area in question which require regulation in the public interest.

History: L. 1978, ch. 437, § 2; July 1.

Law Review and Bar Journal References:

"Kansas Groundwater Management Districts," John C. Peck, 29 K.L.R. 51, 57, 82 (1980).

"Groundwater Pollution I: The Problem and the Law," Robert L. Glicksman, George Cameron Coggins, 35 K.L.R. 75, 145, 146 (1986).

"A State Agency's Role in Protecting Groundwater Quality," Leland E. Rolfs, 35 K.L.R. 419, 424 (1987).

"High Noon on the Ogallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone," Myrl L. Duncan, 27 W.L.J. 16, 77 (1987).

Attorney General's Opinions:

Power to initiate proceedings to institute intensive groundwater use control areas. 81-57.

82a-1037. Same; hearings. In any case where proceedings for the designation of an intensive groundwater use control area are initiated, the chief engineer shall hold and conduct a public hearing on the question of designating such an area as an intensive groundwater use control area. Written notice of the hearing shall be given to every person holding a water right in the area in question and notice of the hearing shall be given by one publication in a newspaper or newspapers of general circulation within the area in question at least thirty (30) days prior to the date set for such hearing. The notice shall state the question and shall denote the time and place of the hearing. At the hearing, documentary and oral evidence shall be taken, and a full and complete record of the same shall be kept.

History: L. 1978, ch. 437, § 3; July 1.

82a-1038. Same; designation of intensive groundwater use control area; orders; corrective control measures; appeals. (a) In any case where the chief engineer finds that any one or more of the circumstances set forth in K.S.A. 82a-1036 and amendments thereto exist and that the public interest requires that any one or more corrective controls be adopted, the chief engineer shall designate, by order, the area in question, or any part thereof, as an intensive groundwater use control area.

(b) The order of the chief engineer shall define specifically the boundaries of the intensive groundwater use control area and shall indicate the circumstances upon which the findings of the chief engineer are made. The order of the chief engineer may include any one or more of the following corrective control provisions: (1) A provision closing the intensive groundwater use control area to any further appropriation of groundwater in which event the chief engineer shall thereafter refuse to accept any application for a permit to appropriate groundwater located within such area; (2) a provision determining the permissible total withdrawal of groundwater in the intensive groundwater use control area each day, month or year, and, insofar as may be reasonably done, the chief engineer shall apportion such permissible total withdrawal among the valid groundwater right holders in such area in accordance with the relative dates of priority of such rights; (3) a provision reducing the permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells in the intensive groundwater use control area; (4) a provision requiring and specifying a system of rotation of groundwater use in the intensive groundwater use control area; (5) any one or more other provisions making such additional requirements as are necessary to protect the public interest.

(c) The order of designation of an intensive groundwater use control area shall be in full force and effect from the date of its entry in the records of the chief engineer's office unless and until its operation shall be stayed by an appeal therefrom in accordance with the provisions of the act for judicial review and civil enforcement of agency actions. The chief engineer upon request shall deliver a copy of such order to any interested person who is affected by such order, and shall file a copy of the same with the register of deeds of any county within which such designated control area lies.

History: L. 1978, ch. 437, § 4; L. 1984, ch. 338, § 31; July 1.

Law Review and Bar Journal References:

"Kansas Groundwater Management Districts," John C. Peck, 29 K.L.R. 51, 57, 58 (1980).

"Groundwater Pollution I: The Problem and the Law," Robert L. Glicksman, George Cameron Coggins, 35 K.L.R. 75, 145, 146 (1986).

"A State Agency's Role in Protecting Groundwater Quality," Leland E. Rolfs, 35 K.L.R. 419, 424 (1987).

82a-1039. No limitation of authority of chief engineer. Nothing in this act shall be construed as limiting or affecting any duty or power of the chief engineer granted pursuant to the Kansas water appropriation act.

History: L. 1978, ch. 437, § 5; July 1.

82a-1040. Act supplemental to K.S.A. 82a-1020 to 82a-1035. The provisions of K.S.A. 82a-1036 to 82a-1039, inclusive, of this act shall be part of and supplemental to the provisions of K.S.A. 82a-1020 to 82a-1035, inclusive, and acts amendatory thereof or supplemental thereto.

History: L. 1978, ch. 437, § 6; July 1.

Eastern Arkansas Region Comprehensive Study
Grand Prairie Area
Demonstration Project

APPENDIX F - LEGAL & INSTITUTIONAL STUDIES

SECTION III

The Legal and Institutional Barriers That Remain to Project Development and Implementation, (PART 1).; Looney, J.W., October 1996.

THE LEGAL AND INSTITUTIONAL BARRIERS THAT REMAIN TO PROJECT DEVELOPMENT AND IMPLEMENTATION (PART 1)

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Research Report prepared in accordance with Contract DACW66-97-P-0023 with U. S. Army Corps of Engineers, Memphis District.

ADDENDUM TO OCTOBER 1996 REPORT

This addendum is addressed to a single question: If the modification to Ark. Code Ann. § 14-116-402(10) suggested in the October 1996 Report (to remove the words "or natural water courses" from that section) is not adopted by the legislature, would the ability of the White River Regional Irrigation Water Distribution District to develop the project be impaired?

The language of Ark. Code Ann. § 14-116-402(10) was modified in the 1995 legislative session by restricting the eminent domain powers of irrigation water districts by providing that this power could not be used for the "acquisition or construction of farm irrigation reservoirs or natural water courses" among other changes. The 1996 Report suggested that this change be modified for clarity since it was not entirely clear what was intended by the addition of this language. A fair reading of the restriction on the use of the eminent domain power is that it was to prevent the use of the power to acquire <u>water</u> from such natural water courses. If so, the ability of the District is not impaired by this restriction because it is the intent of the district to operate with permits from the Soil and Water Conservation District for the transfer of water. The use of eminent domain power for this purpose is not contemplated nor necessary.

The previous section, Ark. Code Ann. § 14-116-402(9) authorizes the use of the bed of "any stream" in the "acquisition, construction, improvement, operation or maintenance" of water distribution facilities so long as this does not adversely affect existing riparian rights. In addition, Ark. Code Ann. § 14-116-

402(3)(E) in referring to the transfer of water provides that riparian owners of natural water courses are not obligated to pay for their historical riparian use from such natural water courses.

Thus, taken in context, it would seem the legislative intent of the 1995 change was to, similarly, protect riparian rights to the water itself and to restrict a district from taking the water from a natural water course given the recognition of the riparian owners rights to this water.

This interpretation is re-enforced by the language of subsequent sections, added in the same legislation in 1995, relating to the establishment of improvement project areas within water districts. This legislation provides its own procedure for the assessment of damages that will accrue to any landowner by reason of the proposed improvements including all injury to lands taken or damaged. Ark. Code Ann. § 14-116-602. And, the board's use of condemnation to "condemn the land that will be taken or damaged" applies when a landowner objects to the assessment of damages. Ark. Code Ann. § 14-116-602.

The legislative establishment of this process for lands taken or damaged as a part of an improvement plan seems to suggest that the restrictions on eminent domain added in Ark. Code Ann. § 14-116-402(10) should be taken as specific to water in natural water courses, and not to land that might be taken or damaged in the development of the improvements. The context of the restriction suggests that it is not intended to impair the District's use of eminent domain power to condemn land necessary for project development.

SCOPE OF WORK

GRAND PRAIRIE AREA DEMONSTRATION PROJECT

LEGAL AND INSTITUTIONAL BARRIERS

TO

PROJECT DEVELOPMENT AND IMPLEMENTATION

PROJECT AREA: The project area includes portions of Arkansas, Prairie, Lonoke, and Monroe Counties in eastern Arkansas. This project area covers 362,662 acres which includes 254,406 acres of cropland.

PROJECT DESCRIPTION: The preliminary plan of improvement for the Grand Prairie area consists of a major pumping station and a network of new canals, existing channels, pipelines, and associated channel structures to provide interbasin transfer of surface water to the water depleted areas. Included as an integral part of the plan are: conservation measures, groundwater management strategies, retrofit of farms, on-farm storage reservoirs, and fish and wildlife restoration and management features. A pumping plant located on the White River just north of Devalls Bluff would be utilized to deliver surface water from the White River throughout the project area during peak use periods and for filling storage reservoirs during off-season periods. Conservation practices included in the plan include water management of irrigation applications, irrigation pipelines, and tailwater recovery systems. Fish and Wildlife restoration and management will be an integral part of the system's operation - especially during the off-season.

PROJECT PURPOSE: The project would provide a supplemental agricultural water supply while preserving the groundwater resource. The project provides significant opportunity for fish and wildlife restoration and environmental enhancement.

STATEMENT OF ISSUE: What legal and institutional barriers remain to project development and implementation?

SCOPE OF INVESTIGATION: A detailed review of existing state legislation, regulations and case law will be conducted, including changes made in the 1995 legislative session, to identify any remaining legal barriers to project development and implementation. Proposals for revision will be included. In addition, a number of questions critical to implementation of the project and the financing of development and operation of the system will be addressed. A list of suggested provisions for a "model" contract will be proposed. Questions and issues to be investigated include, but are not limited to, the following:

1. Do the changes made in the 1995 legislative session to the Regional Water Distribution Act adequately address all the legal questions previously identified?

2. Do the 1995 changes enable the District to continue with the project or are additional amendments necessary?

3. Is it possible for the District to proceed with the development of an Improvement Project Plan under the amendments made in 1995?

4. How will such an Improvement Project be administered and governed? Who selects the Board? Who is eligible to serve on the Board?

5. May the District operate and install the water distribution system developed under the Improvement Project? Does there have to be a special agreement between the boards? Can this be done?

6. May the District or the Improvement Project impose an annual membership fee in addition to the assessments and charges for water delivery? Can it require a minimum purchase each year?

7. May the District Board adopt policies which restrict those who opt out of the District from participating in future water distribution from either the District or the Improvement Project? Charge for all taxes, costs and assessments that would have been paid had the opt out not occurred?

8. Can landowners who opt out of the District then be included in the Improvement Project? Assessed? Vote?

9. What eminent domain authority does the District or the Improvement Project have with respect to land of owners who opt out of either?

10. May the District in its development of the Improvement Project adopt policies related to future riparian rights in what may become in most respects an "artificial" watercourse? How can existing rights be determined and quantified in such a way as to add certainty in the future?

11. Can such a determination be enforced against riparians who are not part of the District or the Improvement Project?

12. How can the authority of the Arkansas Soil and Water Conservation Commission to determine priorities during shortages and to allocate water during shortages be used to pre-adjudicate and quantify existing rights in natural streams?

13. If the area is declared a "critical groundwater area" what would be necessary to allow the District to obtain authority to regulate groundwater withdrawals? Does this possibility affect the issue of whether a landowner who wishes to opt out will have an adequate supply of irrigation water in the future?

14. Who has the burden of proof in the opt out decision?

THE LEGAL AND INSTITUTIONAL BARRIERS THAT REMAIN TO PROJECT DEVELOPMENT AND IMPLEMENTATION

The 1994 report, Institutional and Legal Aspects of Project Development and Implementations identified a number of specific deficiencies in Arkansas law which served as obstacles to the development and implementation of the preliminary plan of improvement for the Grand Prairie Area and, in particular, the functions of the White River Regional Irrigation Water Distribution District.

Legislation was introduced in the 1995 Arkansas General Assembly to deal with most of these problems. It was the subject of hearings and debate during the legislative session and resulted in major modifications of the existing laws related to Regional Water Distribution Districts. In some cases, amendments were made to the existing law that had not been previously identified as obstacles to development and implementation of improvement projects.

The 1995 changes may be summarized as follows:

Excess Surface Water Determination

As a part of the recent changes in Arkansas water law, the Arkansas Soil and Water Conservation Commission (ASWCC) has been given extensive authority to determine if "excess surface water" exists in particular streams. The ASWCC may authorize the transfer to nonriparians for their use only 25% of that amount available from any watershed on an average annual basis from any watershed

above that required to satisfy a number of specified uses including instream uses. In 1995 navigation was added as one of the instream uses that must be satisfied before excess surface water could be determined to exist. In addition a specific provision relating to the White River Basin was added limiting the transfer amount on a monthly basis to an amount which is 50% of the monthly average of each individual month of excess surface water. (Ark. Code Ann. § 15-22-304(b)(4) and (e))

Exclusion of Land from a District

One of the shortcomings of the Regional Water Distribution Act was the ability of owners of real property within the district territory to petition for exclusion of the property for agricultural irrigation water uses. Under Ark. Code Ann. § 14-116-207, before the 1995 amendment, this petition could come at any time before or after the entry of the order establishing the water district. A petition for exclusion required a showing that the property to be excluded was supplied by adequate agricultural irrigation water from other sources and would not in the future be benefited by improvements of the proposed district. The statute added confusion by indicating that lands could be excluded upon a showing that the land was supplied by adequate irrigation water from other sources existing at the time of the order creating the district or at any time thereafter. This created uncertainty as to the burden of proof for exclusion after creation of the district but left open the possibility of owners opting out of the district

at any time upon a mere showing that adequate water was available from other sources. It could be argued that the two-prong showing was necessary either before or after creation of the district but the statute was confusing on this point.

The 1995 legislation attempted to deal with this problem by providing that exclusion could only be requested before the entry of the order establishing the district and before the entry of any order establishing an improvement project area within the district that would include the property of the owner wishing to opt out. The two-pronged showing is now necessary: that the property is supplied by adequate water from other sources and the property is not and will not in the future be benefited by the improvements of the "proposed district." But, as indicated below, it is not clear whether it is now possible to opt out once a district is formed.

Changes in District Powers

Under Ark. Code Ann. § 14-116-402 a district is given broad, but specified, powers to carry out the purposes for which such districts are formed. This section is of particular importance because of the emphasis courts place on looking to such specified powers to determine exactly what such districts may do. A number of important changes were made in this section in 1995. These may be summarized as follows:

(1) Districts have the power to acquire absolute title to and to use for any purpose water stored in reservoirs or from other

sources created under the direction or supervision of the U.S. Army Corps of Engineers; or financed by assistance furnished by the USDA under the provisions of the Watershed Protection and Flood Prevention Act or other federal law. The 1995 change extends this to financing provided by any "federal, state or other sources." (Ark. Code Ann. § 14-116-402(3)(4))

(2) The same extension of authority was also made to the acquisition of storage or withdrawal rights from such sources. (Ark. Code Ann. § 14-116-402(3)(B))

(3) The districts were empowered to deal with a variety of types of properties. The 1995 act clarified this authority by specifically including "real property, personal property, easements, interests in real property" rather than to rely on the broad "property rights" language of the prior law. (Ark. Code Ann. § 14-116-402(3)(D).)

(4) One of the major concerns of such districts is their ability to control water owned, acquired or developed by the district. The 1995 Act clarified this authority by making it clear that districts may "regulate, define, and control the rate and location of any withdrawal or transfer" of such water. And, such water might be in either natural or manmade channels. However, the rights of riparian owners of natural water courses are not obligated to pay for historical riparian use from such natural water courses. It is not

clear how a riparian owner could establish such use. (Ark. Code Ann. § 14-116-402(3)(E))

(5) A major deficiency of the original legislation was that no specific authority was given districts to enter upon lands for purposes of inspection or other purposes associated with carrying out the functions of the district. A 1995 amendment attempts to deal with this deficiency by specifying that the district may authorize "persons" (presumably district personnel) to enter water which has been or is being transported or held by the district if the district has acquired absolute title to land under the water or has permission of the owner of land under the water. While this change would, on its face seem to restrict entry somewhat, this authority does not limit the district's authority to enter on lands for inspection or other purposes. (Ark. Code Ann. § 14-116-402(3)(F)) The question of entry onto land was addressed by authorizing districts; with notice, to enter upon land within or outside the district boundaries for inspection or other district purposes. (Ark. Code Ann. § 14-116-402(18))

(6) One aspect of districts' use of bonds was clarified by the 1995 legislation. Included is specific reference to the Registered Public Obligation Act of Arkansas, Ark. Code Ann. § 19-9-401 et seq., allowing bonds of districts to be registered as public obligation. The bonds may be negotiable bonds (no longer limited to "negotiable coupon bonds payable to bearer"). (Ark. Code Ann. 14-

116-402(7)(B))

(7) The existing legislation authorized districts to use the bed of "any stream without adversely affecting existing riparian rights" in connection with the transportation and distribution of water developed, owned or acquired by the district. A specific provision was added in 1995 making it clear that the riparian users next to such streams are not entitled to receive any such water without paying the district's water user charges. (Ark. Code Ann. § 14-116-402(9))

(8) To carry out their functions such districts must have, and were given in the original legislation, the power of eminent domain. The district could exercise this power under existing condemnation laws to acquire private property for public use such as rights-of-way or other properties necessary in the construction and operation of the district property and business. (Ark. Code Ann. § 14-116-402(10)) A confusing addition was made to this authority in 1995 by adding a limitation that the power could not be used by an irrigation district for the "acquisition or construction of farm irrigation reservoirs or natural water courses." Presumably, this was intended to restrict the districts from condemning existing farm reservoirs or beds of non-navigable streams.

While a district would not likely wish to acquire existing farm reservoirs the language suggests the power might not be

irrigation districts to acquire water from existing structures as outlined in Ark. Code Ann. § 14-116-402(A) and (B). A restrictive amendment was added in 1995 providing that such districts have no power to acquire title to or use water from or acquire water storage or withdrawal rights from a reservoir created by a dam constructed before July 1, 1995. (Ark. Code Ann. § 14-116-402(20)) Since the authority of such districts with regard to such water references "multipurpose" dams constructed by or under the supervision of the U.S. Army Corps of Engineers, a second sentence was added providing that the restriction does not apply to U.S. Army Corps of Engineer projects whose main purpose is navigation. Districts were specifically authorized to obtain water from wells, from excess surface water (defined in Ark. Code Ann. § 15-22-304) and from reservoirs constructed after July 1, 1995. (Ark. Code Ann. § 14-116-402(20)) This unusual attempt to restrict districts may have little real effect except to clarify that water from previously constructed projects is off limits to such irrigation districts. Irrigation districts, in this case, are apparently to be distinguished from other types of regional water distribution districts formed under this legislation.

Contracts With the United States

One of the deficiencies in the prior law was that districts had no specific authority to enter into contracts with the United States for development of plans for construction, operation and maintenance of facilities. A new section was added in 1995 which

confirms this contract authority and allows for contracts or assurances to provide for payment by a water district to the United States for agreed costs and that these changes could be paid from revenues from water sales or from assessments levied pursuant to new authority granted such districts. (Ark. Code Ann. § 14-116-407)

Improvement Project Areas

One of the shortcomings of the 1957 legislation was that it provided bonding authority for water districts and allowed districts to collect charges for water use and services provided by the district. These charges would be the only source of revenue to pay off the bonds and to provide operating and maintaining capital for the districts. (See Ark. Code Ann. § 14-116-402(7), (13)(A) and Ark. Code Ann. § 14-116-404) However, districts were given no taxing authority nor no means to raise revenues by assessments against those properties benefiting from the district.

One of the major additions in the 1995 legislation was to set out a procedure whereby a district could develop an improvement project plan for areas within the district which, if approved by the ASWCC and by the court which established the district, would allow for assessment of benefits to land with the improvement project area and the levying of tax as a charge against the land in proportion to the amount of the assessment of benefits. (Ark. Code Ann. § 14-116-501 to 704).

The central idea of the improvement project plan is to allow the district to develop improvement plans for areas within the

district (which could include the entire water district) to carry out the water district purposes. The plan is to include in a survey and report, as a minimum, the territory which will be benefited; the character of the improvements; an estimate of expenses involved; the proposed works of improvement and their proposed locations; the purposes and need as well as feasibility of the proposed improvements; the method of financing: the amount, if any, to be assessed against the benefited lands; whether lands, lakes or streams within the improvement area of likely to be damaged, and a plan for compensating landowners for damages, if any. (Ark. Code Ann. § 14-116-501(a)(4))

The plan is necessary in order to petition for approval. A majority of owners of the benefited lands and the owners of a majority in value of the benefited lands, as shown on the last assessment of real property in the proposed project areas, must petition for approval. The final plan is submitted to ASWCC, which solicits input from other state agencies and from federal agencies and must hold a hearing and allow public comment on the proposal. The ASWCC may approve the final plan or approve it with modifications. The water district board may then adopt the final plan with any necessary amendments or revisions. (Ark. Code Ann. § 14-116-501(b))

The final plan must then be submitted to the court which established the district for approval. Each landowner within the project area is to be notified of the court's hearing on the petition and be given the opportunity to appear in favor of or

against the plan. If the court finds the plan is in the best interest of owners of land within the proposed district, the court may authorize the district to move forward by employing an assessor whose job it is to determine if at least a majority of owners (and a majority of owners in value) of the benefited lands have signed the petitions for the plan. Upon the assessor's report to the court, the court will enter an order approving the plan and establishing the improvement project area. The order is conclusive and binding on all land within the boundaries of the project area and upon the landowners if no appeal is taken within 30 days. (The board could appeal if the order denies the petition). (Ark. Code Ann. § 14-116-502)

Additional works of improvement for the project area may be undertaken after the work contemplated by the original plan has been completed upon approval of the water district board. This additional plan must also be filed with the court and a proceeding like the original approval held. However, a petition is not necessary. (Ark. Code Ann. § 14-116-505)

The major effect of approval of the improvement plan for a particular improvement project area is to allow assessment of benefits accruing to the land and the levying of a tax against all individual and separate parcels of land within the improvement project area. This tax shall be sufficient to pay the estimated cost of the improvement, all related costs such as interest, bond issuances, legal, accounting, appraisals and debt issuance and up to an additional 20% for unforeseen contingencies. (Ark. Code Ann.

§ 14-116-601)

The assessment of benefits for each improvement project area is to be specific to each tract within the improvement project area and an estimate of what each owner will be required to pay is to be included in the assessment book for each area. (Ark. Code Ann. § 14-116-601)(d)) Upon filing of the assessment with the court clerk a three-member board of adjustment is appointed by the court clerk to hear complaints and to report recommendation to the court. (Ark. Code Ann. § 14-116-602)

A public newspaper notice is required to give owners an opportunity to appear before the board of adjustment to present complaints. (Ark. Code Ann. § 14-116-603) They may present complaints as "aggrieved" owners or, apparently, about the assessment of any other land within the project area. The board of adjustment makes recommendations to the court either confirming or increasing or diminishing the assessment. (Ark. Code Ann. § 14-116-605(a))

The court reviews the assessments deposited by the court. If no complaint is made, the order confirming the assessment will be conclusive. (Ark. Code Ann. § 14-116-603) If a complaint has been made, the court reviews the recommendation of the board of adjustment and enters its findings either confirming, increasing or diminishing the assessment. (Ark. Code Ann. § 14-116-605(b))

It may be that in some cases the assessor will find that tracts within the project areas will incur damages as a result of proposed improvements. The assessor is to assess these damages as

well. (Ark. Code Ann. § 14-116-602) Landowners are to be provided notice by certified mail of the date of hearing by the board of adjustment. If the owner fails to respond by written notice to the court clerk of a demand for reassessment of the damages, he is construed to have accepted the assessment in his favor (or acquiesced in the failure to assess damages in his favor). However, if a written demand for reassessment is made in a timely manner, the board then must institute an action to condemn the land to be taken or damaged. (Ark. Code Ann. § 14-116-604)

Reassessments are possible if the board changes the improvement plan, if there is a change in land use, or if otherwise the water district board determines that the current assessment has become inequitable. The same process is necessary for the confirmation of re-assessments as for the original assessment. (Ark. Code Ann. § 14-116-606)

The court is to enter an order levying the tax against land within the project area which is to be sufficient to pay the estimated cost of the improvement (plus up to 20% added for unforeseen contingencies). The tax is against the land in proportion to the assessment of benefits. The levy is a lien upon the land and is given preference over all other demands, executions, encumbrances or liens and continues until the tax (plus any penalties and costs) are paid. (Ark. Code Ann. § 14-116-608)

The landowner may pay the tax in full, without interest, within 30 days of the levy. Or, the tax may be paid in installments with no more than 10% collectible in any one year. If

Code Ann. § 14-116-609)

Another aspect of the 1995 legislation relates to bonding authority of water districts. While the original legislation authorized water districts to borrow money and to issue bonds, the amendments make it clear that the water district may not only borrow money from any lending source but may pledge and assign assessments and revenues related to an improvement project area for repayment. (Ark. Code Ann. § 14-116-701) Any bonds may be may extend for 40 years and may be in any form and denomination as the board determines. (Ark. Code Ann. § 14-116-701)

Bonds payable from proceeds of assessments are to be secured by a lien on all benefited lands within the improvement project area unless they are payable out of revenue only. (Land within a district not within an improvement project area are not encumbered with the lien.) The board is to see that an annual tax is levied and collected to pay any bond issued. (Ark. Code Ann. § 14-116-704(a)) Procedures are detailed for the collection of taxes if bonds are not paid as due and to foreclose the lien on delinquent parcels of land if necessary. (Ark. Code Ann. § 14-116-704(b))

One clarification was included in the 1995 legislation. That is, the provisions of the Regional Water District Act are not applicable to agencies or of political subdivisions of the state or to lands owned by such agencies (Ark. Code Ann. § 14-116-801 and 14-116-107). This section was added to make it clear that state owned lands or lands of other political subdivision could not be made a part of water districts or included within improvement

project areas. This section was apparently added to remove any uncertainty arising from the application of Rainwater v. Haynes (244 Ark. 1191, 428 S.W.2d 254 (1968)) in which the Arkansas Supreme Court distinguished "taxes" from "assessments" and indicated that state agencies owning land within improvement or special assessment districts should pay the assessments levied by the districts since the lands were benefited by the improvements. This is now specifically provided for by statute with regard to real property located within "levee, drainage, or any other improvement or district." (Ark. Code Ann. § 14-86-605) The 1995 statement provides an exception for water districts since the public agency lands cannot be included with these districts.

(1) Do the changes made in the 1995 legislative session to the Regional Water Distribution Act adequately address all the legal questions previously identified?

Most of the major questions outlined in 1994 were addressed by the 1995 legislation. One matter was not. No change was made in the legislation related to annexation of additional territory into a water district (Ark. Code Ann. § 14-116-406). To annex additional territory would require a petition "prepared, filed, and proceedings had thereon" in the same manner as the original petition praying for formation of the district. It is not clear how many owners would have to petition in such cases.

The original petition procedure (Ark. Code Ann. § 14-116-201) allows for petition by 100 or more qualified voters residing or

owning land situated within the proposed district. This was changed in 1995 to require a petition by qualified voters residing and owning land within the boundaries of the proposed district.

Since the original legislation, not changed in 1995, allows for annexation of additional territory in a manner like the original petition, presumably a petition of the requisite 100 landowners in the territory to be annexed would be necessary. There could be times when individual landowners or smaller groups of landowners might wish to be included. There is no provision for doing so unless the reference to "in the same manner" would allow a petition of 100 landowners, including those already in the water district. The 1949 Irrigation, Drainage and Watershed Improvement District Act provides both a procedure by which lands outside the district may propose to be included and a means for boundary extension. (Ark. Code Ann. § 14-117-208, 209) Similar procedures would be helpful for water districts under the Regional Water Distribution Act. It is proposed that the following change be made in Ark. Code Ann. § 14-116-406:

14-116-406. Annexation of additional territory.

(a) Additional territory may be annexed to and embraced by a water district established and operating under this subchapter by petition to the circuit court in which the water district was originally established.

(b) The petition shall be prepared, filed, and proceedings had thereon in the same manner as is set out in this subchapter for original petitions praying the formation of a water district.

Add:

(c) For agricultural irrigation water districts the following procedure applies:

(1) The holder or holders of title of any body of lands benefited or capable of being benefited by the works of a district may petition the circuit court which established the district to change the boundaries of the district to include that body of lands.

(2) The petition shall describe the boundaries of the parcel or tract of land owned by the petitioner or petitioners.

(3) Upon the filing of the petition the clerk shall prepare a certified copy of the petition and transmit the copy to the commission within five (5) days from the date of filing of the petition.

(A) Upon receipt of the certified copy the commission shall institute an investigation and the commission shall, within thirty (30) days after receipt of the copy transmit a written report of its findings to the clerk.

(B) The report of the commission shall include, but not be limited to:

(i) A finding as to whether the proposed change in boundaries of the water district conflict with the boundaries of any existing water district of which the commission may have supervisory jurisdiction

(ii) A finding as to whether the change in boundaries of the water district would promote the general welfare and be condusive to the purposes of this chapter

(iii) A finding that the water district board of directors approves the change in district boundaries or approves the change with modifications, or disapproves the change.

(iv) Any conditions, revisions, or limitations the commission deems necessary. These changes shall thereupon become a part of the petition.

(4) The clerk shall give notice by publication for two (2) weeks in some newspaper published and having a general circulation in the county or counties within the district, calling upon all persons owning property within the district to appear before the court on some day to be fixed by the court to show cause in favor of or against the inclusion of lands of petitioners.

(5) If the court deems it to be to the best interest of the district that the lands be included in the district, it shall make an appropriate order upon its records changing the boundaries of the district.

(6) If the land to be included in the district is also to be included in an improvement project area as established in accordance with § 14-116-501 et seq. the court shall make an appropriate order upon its records changing the boundaries of the improvement project area within the water district.

(7) If the court finds that lands should be included in the district, the court shall make a finding and order as to an equitable amount to be paid by the petitioner or petitioners in lieu of the amount the petitioners or their grantors would

have been required to pay to the district as assessments had the lands been included in the district at the time the district was originally formed or at the time an improvement project area was established within the district in accordance with § 14-116-501 et seq. These amounts shall be divided into installments as the court may determine and shall be added to and be collected with any assessments subsequently levied against the assessment of benefits and shall be a part of the assessment of benefits.

(8) In addition to the amount to be paid to the district in lieu of past assessments and as subsequent assessments, each petitioner shall be required to pay the water district for any costs associated with furnishing water to lands of the petitioner including costs of facilities, supplies and equipment furnished by the district and any associated construction costs.

(9) All costs of the proceedings shall be assessed against the petitioners.

Comment: This procedure, drawn from that set out in the 1949 Irrigation, Drainage and Watershed Improvement District Act, allows petition by the owners of land who want to be included (eliminating the cumbersome petition by other landowners as now appears necessary) and sets out the exact procedure including the requirement that the petitioners pay an "equitable amount" in lieu of what they would have paid had they been assessed as part of the district lands.

(2) Do the 1995 changes enable the District to continue with the project or are additional amendments necessary?

The 1995 Changes resolve a number of the difficulties posed by the prior Act. However, there should be clarification of a few points.

(A) Improvement Projects for Existing Districts. In the section of the legislation allowing for the development of improvement project plans by a water district, an unfortunate restriction was included which allowed the plan development "if the order establishing the district expressly so permits." (Ark. Code

Ann. § 14-116-501(a)(1) This section would seem to restrict the use of the improvement plan concept to those districts which were given the express authority to develop such plans at the time of creation of the District itself. This would effectively nullify the procedure for existing districts. This language should be removed by amendment as follows:

> 14-116-501. Proposed improvement plan for assessment-based water district projects.
>
> (a)(1) Upon the securing of a petition described in subsection (b) of this section, a water district may, if the order establishing the district expressly so permits, develop an improvement project plan for any purpose contained in § 14-116-102 that would benefit the lands within the district.

Comment: This amendment eliminates the restriction that, by apparent error, made improvement project plans possible only for districts which were given that authority at formation. Only new districts could have used the process.

(B) Exclusion of Land from Improvement Project Areas. The section relating to exclusion of land from a water district, while improved, is still confusing. It suggests that an owner may petition for exclusion "at any time before the entry of the order establishing the district and before the entry of the order establishing an improvement project area." If the change was to make it possible for an owner to opt-out at either point in time -- before district establishment or before the establishment of an improvement project area -- it falls short by using "and." If the intent was to prevent exclusion once the district is formed the reference to improvement project areas would be unnecessary.

A suggested revision is as follows:

14-116-207. Exclusion of land for irrigation purposes.

(a) Any owner of real property within the territory of the proposed water district may, at any time before the entry of the order establishing the district and **or** before the entry of the order establishing an improvement project area including such real property, petition the court to exclude his property for agricultural irrigation water uses.

(b) To exclude the property from the district, the court must make the following determination:

(1) The property is supplied by adequate agricultural irrigation water from surface sources or other sources; and

(2) The property is not and will not in the future be benefited by the improvements of the proposed water district **or by the improvements proposed for the improvement project area.**

add:

(c) The burden of proof is on the owner of real property who petitions for exclusion from a water district to establish the facts necessary for the court's determination as required in subsection (b).

(d) All costs of the proceedings shall be assessed against the petitioners.

Comment: These changes make it clear that landowners may petition for exclusion from the water district at two points in time: before creation of the district or before establishment of an improvement project area. The elements of proof are the same at both times and the burden is placed on the petitioners to satisfy the court that other water is available and the property will not be benefited by district improvements; that is, to satisfy the court that other water is available and the property will not be benefited by district improvements. It is stated that the availability of such water be from surface sources only to discourage continued reliance on groundwater. Costs are paid by the petitioner. In the absence of this change, the district might choose not to object if landowners petition for exclusion prior to the order establishing an improvement project area.

(C) Eminent Domain Restrictions. The change in 1995 related to eminent domain restricts this power for "acquisition or construction" of farm irrigation reservoirs or natural water courses. Surely, the intent was to restrict the use of eminent domain power to acquisition of existing on-farm reservoirs and not the construction of such reservoirs as a part of an improvement project. Furthermore, the restriction on use of the procedure for "natural water courses" is unclear. Perhaps, the intent was to prevent use of the procedure to obtain water from natural streams.

If so, this should be expressly stated. It is proposed that the eminent domain section be amended to omit reference to "construction" and to omit restrictions or use of the power related to natural streams. However, it should be amended to make sure that private or farm reservoirs are not subject to eminent domain. The following change to Ark. Code Ann. § 14-116-402:

> 14-116-402. District powers.
>
> Each water district shall have power to:
>
> . . .
>
> (10) Have and exercise the right of eminent domain for the purpose of acquiring rights-of-way and other properties necessary in the construction or operation of its property and business in the manner now provided by the condemnation laws of this state for acquiring private property for public use; however, this power shall not be used by an irrigation water district for the acquisition or construction of **private on-farm** irrigation reservoirs, or natural water courses and any surplus property obtained by an irrigation water district under this power shall be first offered to the person or persons owning the remaining property from which it was taken at the price paid as eminent domain damages before it may be sold to others;

Comment: This change eliminates the unfortunate restriction placed on use of eminent domain for the construction of reservoirs and relating to water courses and clarifies what is meant by restrictions on use of eminent domain. It could not be used to acquire private on-farm irrigation reservoirs.

(3) Is it possible for the District to proceed with the development of an Improvement Project Plan under the amendments made in 1995?

The 1995 amendments would seem to allow a district to proceed on its own to develop a preliminary plan without approval of ASWCC or the court. However, the unfortunate language which appears in Ark. Code Ann. § 14-116-501(a)(1) mentioned above in Questioan 2 must be removed before an existing district could proceed.

(4) How will such an Improvement Project be administered and

governed? Who selects the Board? Who is eligible to serve on the Board?

The clear intent of the 1995 additions related to improvement project plans and improvement project areas was to allow a water district to develop an improvement project plan for territory within the district. This apparently could consist of all land within the water district included within a single improvement project area or could consist of selected parcels which would be benefited by the improvements to be proposed. The legislation specifically mentions that the territory need not consist of contiguous parcels of land. (Ark. Code Ann. § 14-116-501(a)(4)(A)) The inclusion of this authority within the legislation, coupled with the lack of mention of any separate governing authority, reflects the intent that it is the water district board which is to develop and propose any improvement project plan and, if established, to act as the governing authority for the project area. The district is to identify by number or name the improvement project area. (Ark. Code Ann. § 14-116-501(a)(2)); the district is to employ an engineer or seek assistance of state or federal agencies in developing the plan (Ark. Code Ann. § 14-116-501(a)(3)); the district is to secure the petition of a majority of owners of the benefited lands and a majority in value of the benefited lands (Ark. Code Ann. § 14-116-501(b)); the district board must adopt the final improvement plan (Ark. Code Ann. § 14-116-501(e)); and seek court approval of the improvement plan. (Ark. Code Ann. § 14-116-502(a)) No separate governing body is

contemplated for the project area.

(5) May the district operate and install the water distribution system developed under the Improvement Project Plan? Does there have to be a special agreement between the boards? Can this be done?

The improvement plan to be developed by the water district for a particular improvement project area must contain, as a minimum, specified information on the proposed territory to be benefited as well as the nature and character of improvements; the proposed works of improvement and their location; the estimated expenses involved; the method of financing; the proposed assessment amount; estimates of damages as a result of acquisition as construction of the improvements; and, a plan for compensation for damages. (Ark. Code Ann. § 14-116-501(4)) Since this is but a list of minimum information required in the plan, any additional details on installation or operation could be included, if desired. The intent that it is up to the district to carry out the installation and operation is clear from the right of the district to be repaid all costs and expenses of "preparation, adoption and approval" from the "first taxes or other revenues collected by the district for carrying out the improvement plan." (Ark. Code Ann. § 14-116-503) Furthermore, it is up to the water district board to propose a levy of tax for the preliminary expenses if the board "does not deem it to the advantage of the project area to proceed immediately with the construction of the works of improvement." (Ark. Code Ann. §

land within the improvement project area but must be collected in the form of a tax, with court approval each year for operation and maintenance.

Presumably, the contract for supplying water could specify additional charges as fixed by the water district and could detail any particular requirements for payment of fees for water, supplies, equipment or services furnished by the water district.

(7) May the District Board adopt policies which restrict those who opt out of the District from participating in future water distribution from either the district or the improvement project? Charge for all taxes, costs and assessments that would have been paid had the opt-out not occurred?

The questions of excluding land from the district must be considered separately from that of opting out of the improvement district. It is not entirely clear from the 1995 amendment to the statute providing for land to be excluded whether this applies at both district formation and at the time of creation of the improvement project area.

The exclusion statute was modified in 1995. Prior to the change a landowner could petition the court for exclusion at any time before or after the entry of the order establishing the district. The exclusion at the time of formation would be authorized only upon a finding of the court that the land is supplied by adequate agricultural irrigation water and would not in the future be benefited by improvements of the proposed district.

Apparently, the land could be excluded at other time by showing there was adequate water from other sources. Whether the second tier of the test was necessary is unclear.

The 1995 change modified the statute to allow for exclusion before the entry of the order establishing the district upon the two part showing. Exclusion after formation is no longer mentioned. However, the statute was amended to provide for petition for exclusion "at any time before the entry of the order establishing the district and before the entry of the order establishing an improvement project area." Perhaps the intent was to allow landowners to petition for exclusion either before formation of the district or before the establishment of the improvement project area. If so, the two part test must be met at either time but that interpretation would allow a landowner to opt out of the district, although originally included, prior to establishment of the improvement project area. (Ark. Code Ann. § 14-116-207) It appears that any opt-out would have to be from the district since the two part test applies to that exclusion (Ark. Code Ann. § 14-116-207(b))

It is clear that once both events have occurred, opt-out is no longer possible and all land within the improvement project area is subject to assessment of benefits. There is no separate procedure by which a landowner could petition for exclusion from improvement project area but remain in the district.

Whatever the time of the opt-out, once a landowner is no longer within the district if, in the future, water distribution

in the Improvement Project? Assessed? Vote?

The 1995 legislation allowing for the development of an improvement project plan refers only to lands within the district (Ark. Code Ann. § 14-116-501(a)(1)) In fact, the definition of "improvement project area" refers to an area "within the district." (Ark. Code Ann. § 14-116-103(s)) And, the identification of those who must petition for the creation of the improvement project area is specifically a majority of owners of the benefited lands and the owners of a majority in value of the benefited lands based on the last assessment of real property within the proposed improvement project area within the water district. (Ark. Code Ann. § 14-116-501(b))

Thus, if a landowner opts out of the district, that landowner cannot participate in the process for establishment of the improvement project area and those lands would not be included in the assessment of benefits; assessment is made on basis of benefits to land within the project area. (Ark. Code Ann. § 14-116-601) If land outside the project area is taken or damaged by reason of the proposed improvements, an assessment of damages as to those lands is, of course, required. (Ark. Code Ann. § 14-116-601(e)

(9) Who has the burden of proof in the opt-out decision?

The procedure for exclusion of land from a district now provides that the landowner who wishes to exclude his land must petition the court for the exclusion. The court has to find that the property is supplied by adequate agricultural irrigation water

from surface or other sources and that the property is not and will not in the future be benefited by the improvements in the water district. (Ark. Code Ann. § 14-116-207) Prior to the 1995 Amendment this two tiered finding was also necessary if an owner wished to exclude property before the entry of the order establishing the district. (Ark. Code Ann. § 14-116-207(a) [prior law]) However, the exclusion at any time thereafter was apparently allowed only upon a showing of adequate water from other sources. (Ark. Code Ann. § 14-116-207(b) [prior law])

While it is not entirely clear from the legislation, it would seem that those who petition for exclusion, as the moving parties, would have the burden of presenting the court with evidence to support a determination of the court that the land should be excluded. It is an elementary matter of civil procedure that a moving party has the burden of proof in presenting at least a prima facie case to support the petition.

(10) If the area is declared a "critical groundwater area" what would be necessary to allow the district to obtain authority to regulate groundwater withdrawals? Does this possibility affect the issue of whether a landowner who wishes to opt out will have an adequate supply of irrigation water in the future?

Under legislation enacted in 1985 the ASWCC was required to define critical water areas and to delineate areas now critical or which will be critical within the next thirty years. (Ark. Code Ann. § 15-22-301(9)) The ASWCC has identified critical groundwater

areas in the Arkansas Water Plan. (Arkansas Water Plan at 21) As a second step in the process the ASWCC must designate an area as a critical area following public hearings in each county in a proposed critical area. (Ark. Code Ann. § 15-22-908) Once an area is designated as critical the ASWCC must then make an additional determination -- that the initiation of regulatory authority within the critical area is necessary (Ark. Code Ann. § 15-22-909)

Once this finding has been made, in accordance with procedures outlined in the Arkansas Administrative Procedures Act, a regulatory program affecting groundwater withdrawals could be implemented subject to the various "grandfathered" rights outlined in the legislation (Ark. Code Ann. § 15-22-905)

The purpose statement of the groundwater legislation indicates that if regulatory programs are implemented in the future, the ASWCC should make "every effort" to delegate water management powers to qualified local districts. (Ark. Code Ann. § 15-22-902) Regional water districts along with local conservation districts are defined as qualified local districts for this purpose. (Ark. Code Ann. § 15-22-903(7)(11)) The ASWCC may delegate any of its powers to the local district within the critical groundwater area. (Ark. Code Ann. § 15-22-904(8)-(9))

If the ASWCC designates a local water district as the appropriate regulatory body for implementing a regulatory program, the district would have to recognize the "grandfathered" rights of existing users of groundwater through a "water rights" system. Also, the "grandfathering" of rights also applies to any new wells

constructed within the first year of initiation of the regulatory program.

Under the groundwater legislation a reduction or limitation on withdrawal of water from existing wells with "grandfathered" rights cannot be imposed unless alternative supplies are available or could be made available at a cost no greater than the operating costs of the wells (including depreciation). (Ark. Code Ann. § 15-905(1)) Furthermore, no limitation is allowed for those who have reduced the use of groundwater (after 1986) by twenty percent with water conservation measures or conversion to surface water or has implemented a water conservation plan approved by ASWCC. (Ark. Code Ann. § 15-22-905(2)

Subject to these constraints the local district could impose regulatory restrictions on the withdrawal of groundwater. However, the effectiveness of these restrictions on users who wish to be excluded from the district is questionable.

At first blush it would appear that the designation of the area as a critical groundwater area and the implementation of controls or groundwater would make it more difficult for an owner to argue that adequate irrigation water was available from other sources, especially groundwater. But, the fact that existing uses would be grandfathered (presumably based on historical use that is properly registered with the ASWCC) would give that owner an argument that adequate water for irrigation was available. And, the fact that an owner could initiate new uses from wells constructed in the first year of the regulatory program would make

it even more difficult to effectively regulate withdrawals.

There is also the question of how broad the delegation of authority from the ASWCC would be. The statute which authorizes delegation to local districts suggests this may be to those within the critical groundwater area. It is not clear whether the ASWCC could or would delegate to a water district the authority to regulate groundwater outside the district boundaries. Thus, those who were excluded from the district might not come within district control in any event.

(11) What eminent domain authority does the District or the Improvement Project have with respect to land of owners who opt out of either?

The eminent domain authority of the district is general. The general power of condemnation referred to in this legislation allows private property to be taken for public use with full compensation to the owners. It applies for the purpose of "acquiring rights-of-way and other properties necessary in the construction or operation of its property and business in the manner now provided in the condemnation laws of this state for acquiring private property for public use." (Ark. Code Ann. § 14-116-402(10)) It was restricted somewhat by the 1995 amendments which does not allow it to be used for "the acquisition of construction of farm irrigation reservoir or natural water courses" and requires that any "surplus" property acquired by eminent domain be offered to the owners of the property from which it was taken

before being sold to others. (Ark. Code Ann. § 14-116-402(11))

The addition of the possibility of creating improvement project areas does not change the general power. It does create a specific process for the identification of property which might be damaged, for the assessment of those damages and a process for landowners to contest that assessment. The preliminary improvement plan must include an indication of which "lands, lakes, or natural water courses, rivers, tributaries, or streams within the project improvement area are likely to be damaged and a plan for compensating landowners for damages, if any. (Ark. Code Ann. § 14-116-501(4)(H)(I)) The assessor who assess land within the project area for purposes of the levying of taxes on the basis of benefits accruing to the land, also is to assess all damages to any landowners by reason of the proposed improvements, "including all injury to lands taken or damaged." (Ark. Code Ann. § 14-116-501(e)) The difference in language suggests this assessment of damages is to extend beyond the boundaries of the improvement project area to any landowner.

Notice is contemplated by certified mail to landowners who have an assessment of damages in their favor. This notice gives the landowner an opportunity to demand a reassessment of damages if done in writing to the court clerk. If the landowner fails to object in writing he is construed to have acquiesced in the assessment of damages. In the event of an objection the district is to institute an action for condemnation for land that would be taken or damaged in carrying out the works of improvement included

in the improvement plan. (Ark. Code Ann. § 14-116-604)

Since "works of improvement" are specifically defined to include facilities developed by the water district as part of an improvement plan and "need not be located exclusively within a proposed improvement project area or within the water district" (Ark. Code Ann. § 14-116-103(11)) this procedure must have intended to apply to any landowners, including those within the improvement project area, those outside the improvement project area but within the district, or those outside the district.

(12) May the District in the development of the Improvement Project adopt policies related to future riparian rights in what may become in most respects "artificial" watercourses? How can existing rights be determined and quantified in such a way as to add certainty in the future?

Water districts are given the authority to "regulate, define, and control" the location of any withdrawal or transfer of water developed by the district in natural or manmade channels provided that riparian owners of natural maintenance are not obligated to pay for their "historical" riparian use from the natural water courses. (Ark. Code Ann. § 14-116-402(3)(E)) It is also clear that such riparian owners may not receive water owned, acquired or developed by the water district without paying the districts water user charges. (Ark. Code Ann. § 14-116-402(9))

The difficulty is that current law provides no vehicle for quantifying and determining the extent of that right in advance.

While it is true that such users are to report their diversions annually, which would provide some basis for determining the historical use, this reporting does not establish a legal right to continue that level of use in periods of shortage. In fact, the ASWCC is given authority to allocate among all registered users during periods of shortage. This allocation authority could be delegated to local districts under guidelines which the districts shall follow. (Ark. Code Ann. § 15-22-221)

To effectively control such withdrawals by riparians on natural streams it would be necessary, first, to determine their historical use from registration information. Their relative priority in the "order of preference" scheme would have to be established as well which, for most existing riparians would be the first priority after all reserved uses. Then, the appropriate body (ASWCC or the local district if so delegated) could allocate among such riparians during times of shortages.

(13) How can the authority of the ASWCC to determine priorities during shortages and to allocate water during shortages be used to pre-adjudicate and quantify existing rights in natural streams?

The authority of the ASWCC to allocate available stream water during periods of shortages has existed since 1957 (Ark. Code Ann. § 15-22-205(3)) The procedure for doing so is outlined in ASWCC rules in which the amount to be allocated is expressed as a percentage of available water on a daily basis under varying levels of flow. (ASWCC Rules § 311.1) The ASWCC has included a provision

for a "predetermined allocation plan" to be developed on a trial basis in the White River study area. (ASWCC Rules 304.14, 305.18) The idea would be to determine, in advance, what allocations should be made if a water shortage occurs. The implementation of this program would seem to be essential to a fully functioning allocation program especially if the authority is to be delegated to a local district. Some determination of the average amount which could be taken by existing riparians over a specified period would seem to be necessary. Historic flow data combined with diversion reporting will enable the ASWCC to make this determination under existing law.

(14) Can such a determination be enforced against riparians who are not part of the District or the Improvement Project?

The authority of the ASWCC extends to the allocation of water between all riparians. And, given the agency authority to permit non-riparian transfer, any allocation would have to apply to any such non-riparian uses as well. Under the current "order of preference" scheme these uses are of lower priority. (ASWCC Rule § 307.4) Within categories of uses (e.g., all riparians) the intent may be to make allocations on a "first in time, first in right" basis although not stated in the rules. The extent to which this approach would conflict with the traditional idea that all riparian uses have an equal right to make reasonable use of the water is not certain.

Since all riparians are affected by the allocation decision

the authority to allocate during shortages must take into account riparians both within and those outside the district boundaries. Presumably, each diverter would be assigned an allocation based on allowable daily pumping expressed both as a percentage and as a quantitative measure with appropriate reference to a staff gauge reading. (ASWCC Rules § 311.1) Any pre-determined allocation plan would take into account all existing riparians.

SUMMARY OF PROPOSED LEGISLATION

The following changes are proposed for action in the 1997 legislative session. (Language shaded is to be omitted; language in bold is to be added.)

1. CLARIFICATION OF THE PROCEDURE FOR EXCLUSION OF LAND FROM A WATER DISTRICT

14-116-207. Exclusion of land for irrigation purposes.

(a) Any owner of real property within the territory of the proposed water district may, at any time before the entry of the order establishing the district and **or** before the entry of the order establishing an improvement project area including such real property, petition the court to exclude his property for agricultural irrigation water uses.

(b) To exclude the property from the district, the court must make the following determination:

(1) The property is supplied by adequate agricultural irrigation water from surface sources or other sources; and

(2) The property is not and will not in the future be benefited by the improvements of the proposed water district **or by the improvements proposed for the improvement project area.**

add:

(c) The burden of proof is on the owner of real property who petitions for exclusion from a water district to establish the facts necessary for the court's determination as required in subsection (b).

(d) All costs of the proceedings shall be assessed against the petitioners.

Comment: These changes make it clear that landowners may petition for exclusion from the water district at two points in time: before creation of the district or before establishment of an improvement project area. The elements of proof are the same at both times and the burden is placed on the petitioners to satisfy the court that other water is available and the property will not be benefited by district improvements; that is, to satisfy the court that other water is available and the property will not be benefited by district improvements. It is stated that the availability of such water be from surface sources only to discourage continued reliance on groundwater. Costs are paid by the petitioner. In the absence of this change, the district might choose not to object if landowners petition for exclusion prior to the order establishing an improvement project area.

2. A MORE DETAILED PROCEDURE FOR ANNEXATION OF ADDITIONAL TERRITORY (INCLUDING ANY PREVIOUSLY EXCLUDED)

14-116-406. Annexation of additional territory.

(a) Additional territory may be annexed to and embraced by a water district established and operating under this subchapter by petition to the circuit court in which the water district was originally established.

(b) The petition shall be prepared, filed, and proceedings had thereon in the same manner as is set out in this subchapter for original petitions praying the formation of a water district.

Add:

(c) For agricultural irrigation water districts the following procedure applies:

(1) The holder or holders of title of any body of lands benefited or capable of being benefited by the works of a district may petition the circuit court which established the district to change the boundaries of the district to include that body of lands.

(2) The petition shall describe the boundaries of the parcel or tract of land owned by the petitioner or petitioners.

(3) Upon the filing of the petition the clerk shall prepare a certified copy of the petition and transmit the copy to the commission within five (5) days from the date of iling of the petition. (A) Upon receipt of the certified copy the commission shall institute an investigation and the commission shall, within thirty (30) days after receipt of the copy transmit a written report of its findings to the clerk.

(B) The report of the commission shall include, but not be limited to:

(i) A finding as to whether the proposed change in boundaries of the water district conflict with the boundaries of any existing water district of which the commission may have supervisory jurisdiction

(ii) A finding as to whether the change in boundaries of the water district would promote the general welfare and be condusive to the purposes of this chapter

(iii) A finding that the water district board of directors approves the change in district boundaries or approves the change with modifications, or disapproves the change.

(iv) Any conditions, revisions, or limitations the commission deems necessary. These changes shall thereupon become a part of the petition.

(4) The clerk shall give notice by publication for two (2) weeks in some newspaper published and having a general circulation in the county or counties within the district, calling upon all persons owning property within the district to appear before the court on some day to be fixed by the court to show cause in favor of or against the inclusion of lands of petitioners.

(5) If the court deems it to be to the best interest of the district that the lands be included in the district, it shall make an appropriate order upon its records changing the boundaries of the district.

(6) If the land to be included in the district is also to be included in an improvement project area as established in accordance with § 14-116-501 et seq. the court shall make an appropriate order upon its records changing the boundaries of the improvement project area within the water district.

(7) If the court finds that lands should be included in the district, the court shall make a finding and order as to an equitable amount to be paid by the petitioner or petitioners in lieu of the amount the petitioners or their grantors would have been required to pay to the district as assessments had the lands been included in the district at the time the district was originally formed or at the time an improvement project area was established within the district in accordance with § 14-116-501 et seq. These amounts shall be divided into installments as the court may determine and shall be added to and be collected with any assessments subsequently levied against the assessment of benefits and shall be a part of the assessment of benefits.

(8) In addition to the amount to be paid to the district in lieu of past assessments and as subsequent assessments, each petitioner shall be required to pay the water district for any costs associated with furnishing water to lands of the petitioner including costs of facilities, supplies and equipment furnished by the district and any associated construction costs.

(9) All costs of the proceedings shall be assessed against the petitioners.

Comment: This procedure, drawn from that set out in the 1949 Irrigation, Drainage and Watershed Improvement District Act, allows petition by the owners of land who want to be included (eliminating the cumbersome petition by other landowners as now appears necessary) and sets out the exact procedure including the requirement that the petitioners pay an "equitable amount" in lieu of what they would have paid had they been assessed as part of the district lands.

3. CLARIFICATION OF EMINENT DOMAIN PROCEDURE

14-116-402. District powers.

Each water district shall have power to:

. . .

(10) Have and exercise the right of eminent domain for the purpose of acquiring rights-of-way and other properties necessary in the construction or operation of its property and business in the manner now provided by the condemnation laws of this state for acquiring private property for public use; however, this power shall not be used by an irrigation water district for the acquisition or construction of private on-farm irrigation reservoirs or natural water courses, and any surplus

property obtained by an irrigation water district under this power shall be first offered to the person or persons owning the remaining property from which it was taken at the price paid as eminent domain damages before it may be sold to others;

Comment: This change eliminates the unfortunate restriction placed on use of eminent domain for the construction of reservoirs and related to water courses and clarifies what is meant by restrictions on use of eminent domain. It could not be used to acquire private on-farm irrigation reservoirs.

4. CLARIFICATION OF IMPROVEMENT PROJECT PLAN AUTHORITY

14-116-501. Proposed improvement plan for assessment-based water district projects.

(a)(1) Upon the securing of a petition described in subsection (b) of this section, a water district may, if the order establishing the district expressly so permits, develop an improvement project plan for any purpose contained in § 14-116-102 that would benefit the lands within the district.

Comment: This amendment eliminates the restriction that, by apparent error, made improvement project plans possible only for districts which were given that authority at formation. Only new districts could have used the process.

Eastern Arkansas Region Comprehensive Study
Grand Prairie Area
Demonstration Project

APPENDIX F - LEGAL & INSTITUTIONAL STUDIES

SECTION IV

Institutional Aspects of Contracts to Furnish Water by an Improvement District; Looney, J.W., September 1997

INSTITUTIONAL ASPECTS OF CONTRACTS TO FURNISH WATER BY AN IMPROVEMENT DISTRICT

J. W. LOONEY
Distinguished Professor of Law
University of Arkansas School of Law
Fayetteville, Arkansas

September, 1997

SCOPE OF WORK

GRAND PRAIRIE AREA DEMONSTRATION PROJECT

INSTITUTION ASPECTS OF CONTRACTS

TO FURNISH WATER BY AN IMPROVEMENT DISTRICT

PROJECT AREA: The project area includes portions of Arkansas, Prairie, Lonoke, and Monroe Counties in eastern Arkansas. This project area covers 362,662 acres which includes 254,406 acres of cropland.

PROJECT DESCRIPTION: The preliminary plan of improvement for the Grand Prairie area consists of a major pumping station and a network of new canals, existing channels, pipelines, and associated channel structures to provide interbasin transfer of surface water to the water depleted areas. Included as an integral part of the plan are: conservation measures, groundwater management strategies, retrofit of farms, on-farm storage reservoirs, and fish and wildlife restoration and management features. A pumping plant located on the White River just north of Devalls Bluff would be utilized to deliver surface water from the White River throughout the project area during peak use periods and for filling storage reservoirs during off-season periods. Conservation practices

included in the plan include water management of irrigation applications, irrigation pipelines, and tailwater recovery systems. Fish and Wildlife restoration and management will be an integral part of the system's operation--especially during the off-season.

PROJECT PURPOSE: The project would provide a supplemental agricultural water supply while preserving the groundwater resource. The project provides significant opportunity for fish and wildlife restoration and environmental enhancement.

STATEMENT OF ISSUE: What legal and institutional considerations of contracting to furnish water to the user by an improvement district.

SCOPE OF INVESTIGATION: Work will consist of the research, analysis, and report preparation required to identify and document any restrictions to or needs in pursuing the contracting to furnish water to potential users in the project area. A draft "model" contract shall be included in the report. Issues to be considered include, but are not limited to, the following:

1. How does the District or the Improvement Project assure payment

for water? crop liens? Liens on land? contract only?

2. Does the contract with the farmer, including payment agreement concerning water, provide sufficient security to accomplish financing goals?

3. Does the contract for furnishing water run with the land or is it individual to the farmer? Can it be transferred? If minimum purchase requirements are included can the water be then transferred to others? To non members or those outside the District? How can this be prevented?

4. Who is obligated to sign any contracts to furnish water--the landlord or the tenant? Who is responsible for the assessment, the annual fee, if any, and for paying the cost of water delivery? Should the District require both the landlord and tenant to agree?

5. Can the payment for water used be delayed until harvest and, if so, may interest be charged on the value of water used without an up front payment?

6. What provisions should be contained in a "model" water supply contract?

INSTITUTIONAL ASPECTS OF CONTRACTS

TO FURNISH WATER BY AN IMPROVEMENT DISTRICT

The 1994 report, Institutional and Legal Aspects of Project Development and Implementation, identified a number of specific deficiencies in Arkansas law which served as obstacles to the development and implementation of the preliminary phase of improvement for the Grand Prairie Area and, in particular, the functions of the White River Regional Irrigation Water Distribution District. The October 1996 report, The Legal and Institutional Barriers That Remain to Project Development and Implementation, summarized and analyzed legislation introduced in the 1995 General Assembly to deal with most of the problems identified in the 1994 report and proposed additional modifications that would make development and implementation of the project possible. Legislation was introduced in the 1997 General Assembly to accomplish these objectives. A copy of the legislation follows.

State of Arkansas *As Engrossed: S3/11/97*
81st General Assembly A Bill
Regular Session, 1997 ACT 907 of 1997 HOUSE BILL 1476

By: Representatives Northcutt, Fletcher, Mullenix, McGinnis, Simmons, and Milum
By: *Senator Edwards*

For An Act To Be Entitled
"AN ACT TO AMEND VARIOUS SECTIONS OF THE REGIONAL WATER DISTRIBUTION DISTRICT ACT; AND FOR OTHER PURPOSES."

Subtitle
"AN ACT TO AMEND VARIOUS SECTIONS OF THE REGIONAL WATER DISTRIBUTION DISTRICT ACT."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code 14-116-207 is amended to read as follows:

"§ 14-116-207. Exclusion of land for irrigation purposes.

(a) Any owner of real property within the territory of the proposed water district may, at any time before the entry of the order establishing the district ~~and~~ or before the entry of the order establishing an improvement project area including such real property, petition the court to exclude his property for agricultural irrigation water uses.

(b) To exclude the property from the district, the court must make the following determination:

(1) The property is supplied by adequate agricultural irrigation water from surface sources *or other sources*; and

(2) The property is not and will not in the future be benefited *by the improvements of the proposed water district*.

SECTION 2. Arkansas Code 14-116-402(10), which is one of the statutory powers of water districts, is amended to read as follows:

"(10) Have and exercise the right of eminent domain for the purpose of acquiring rights-of-way and other properties necessary in the construction or operation of its property and business in the manner now provided by the condemnation laws of this state for acquiring private property for public use; however, this power shall not be used by an irrigation water district for the acquisition or construction of ~~farm~~ private on-farm irrigation reservoirs or *natural water courses*, and any surplus property

obtained by an irrigation water district under this power shall be first offered to the person or persons owning the remaining property from which it was taken at the price paid as eminent domain damages before it may be sold to others;"

SECTION 3. Arkansas Code 14-116-501(a)(1) is amended to read as follows:

"(a)(1) Upon the securing of a petition described in subsection (b) of this section, a water district may~~, if the order establishing the district expressly as permits,~~ develop an improvement project plan for any purpose contained in § 4-116-102 that would benefit the lands within the district."

SECTION 4. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 5. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SECTION 6. All laws and parts of laws in conflict with this act are hereby repealed.

/s/ Northcutt et al

APPROVED_____
GOVERNOR

This legislation clarifies the procedure for exclusion of land

from a water district, clarifies the eminent domain procedure and clarifies improvement project plan authority.

The law prior to 1995 suggested that land could be excluded from a water district only by a petition prior to the establishment of the district. With the addition of authority to establish improvement project areas an unfortunate conjunction was added ("and") to Arkansas Code Ann.§ 14-116-207(a) allowing exclusion upon petition before establishment of the water district and before establishment of the project area. The apparent intent was to give property owners a second opportunity to petition for exclusion prior to establishment of the project area but after a district had been formed. The 1997 amendment charges the conjunction to "or" allowing a petition at either time. The elements of proof are the same at both times.

During the debate over the proposed legislation questions arose concerning the eminent domain procedure which, in turn, raised concerns as to whether the continued restriction on the use of eminent domain power by irrigation water districts for acquisition of "natural water courses" would impede a district's ability to develop an improvement project which would include sites for dams and weirs within the beds of existing streams. In response to this question, a short Addendum to the October 1996 report was developed to address a single question: If the modification to Ark. Code Ann. § 14-116-402(10) suggested in the October 1996 Report (to remove the words "or natural water courses" from that section) is not adopted by the legislature,

would the ability of the White River Regional Irrigation Water Distribution District to develop the project be impaired?

The language of Ark. Code Ann. § 14-116-402(10) was modified in the 1995 legislative session by restricting the eminent domain powers of irrigation water districts by providing that this power could not be used for the "acquisition or construction of farm irrigation reservoirs or natural water courses" among other changes. The 1996 Report suggested that this change be modified for clarity since it was not entirely clear what was intended by the addition of this language. A fair reading of the restriction on the use of the eminent domain power is that it was to prevent the use of the power to acquire water from such natural water courses. If so, the ability of the District is not impaired by this restriction because it is the intent of the district to operate with permits from the Soil and Water Conservation District for the transfer of water. The use of eminent domain power for this purpose is not contemplated nor necessary.

The previous section, Ark. Code Ann. § 14-116-402(9) authorizes the use of the bed of "any stream" in the "acquisition, construction, improvement, operation or maintenance" of water distribution facilities so long as this does not adversely affect existing riparian rights. In addition, Ark. Code Ann. § 14-116-402(3)(E) in referring to the transfer of water provides that riparian owners of natural water courses are not obligated to pay for their historical riparian use from such natural water courses.

Thus, taken in context, it would seem the legislative intent of the 1995 change was to, similarly, protect riparian rights to the water itself and to restrict a district from taking the water from a natural water course given the recognition of the riparian owners rights to this water.

This interpretation is re-enforced by the language of subsequent sections, added in the same legislation in 1995, relating to the establishment of improvement project areas within water districts. This legislation provides its own procedure for the assessment of damages that will accrue to any landowner by reason of the proposed improvements including all injury to lands taken or damaged. Ark. Code Ann. § 14-116-602. And, the board's use of condemnation to "condemn the land that will be taken or damaged" applies when a landowner objects to the assessment of damages. Ark. Code Ann. § 14-116-602.

The legislative establishment of this process for lands taken or damaged as a part of an improvement plan seems to suggest that the restrictions on eminent domain added in Ark. Code Ann. § 14-116-402(10) should be taken as specific to water in natural water courses, and not to land that might be taken or damaged in the development of the improvements. The context of the restriction suggests that it is not intended to impair the District's use of eminent domain power to condemn land necessary for project development.

The 1997 amendment did clarify another troublesome aspect of the eminent domain procedure. Arkansas Code Ann. § 14-116-

402(10), as amended in 1995, restricted the use of eminent domain power for the "acquisition or construction of farm irrigation reservoirs." The apparent intent was to deal with private on-farm irrigation reservoirs and not to restrict a district's ability to construct its own reservoirs. The 1997 amendment substitutes "private on-farm" for "farm" to clarify this point.

The third part of the 1997 change strikes language in Arkansas Code Ann. 14-116-501(a)(1) that seemed to suggest that water districts' authority to develop improvement project plans would have to be included in the original order creating such districts. This unintended result would have prevented any existing water districts from developing improvement project plans.

With the adoption of this proposed legislation, the remaining legal barriers to project development and implementation appear to have been removed. There remain the legal and institutional considerations of contracting to furnish water to the user by an improvement district. The purpose of this report is to address these questions, as outlined in the Scope of Work. To develop answers to the specific question posed, it is necessary, first, to review the options available to a water district for project financing and the general powers of districts related to contracting to supply water and related services.

OPTIONS FOR PROJECT FINANCING

With the addition in 1995 of the option of the creation of improvement project areas within regional water distribution districts, a District has additional flexibility in how to proceed. A District may choose to use this authority to create an improvement project area within the water district upon petition of a majority of the owners of the benefited lands and the owners of a majority in value of the benefited lands, as shown by the last assessment of real property within a proposed improvement project area within the water district. (Ark. Code Ann. § 14-116-501)

In addition, the district might choose to use the procedures set out in the Arkansas Irrigation, Drainage and Watershed Improvement District Act of 1949 (Acts 1949, No. 329 now codified at Ark. Code Ann. § 14-117-101 to 427) to create sub-districts embracing limited areas of land within the existing district. This procedure allows for petition by a majority in number of owners, exclusive of the owners of real property in incorporated towns or cities, or the lands or the owners of a majority in value of the lands, exclusive of owners of real property in incorporated towns or cities. (Ark. Code Ann. § 14-117-202) (A somewhat truncated procedure is allowed if a majority in number of owners and the owners of a majority in value present the petition under Ark. Code Ann. § 14-117-203)

These districts have their own governing body -- a five

member board of commissioners appointed by the court. (Ark. Code Ann. § 14-117-301) The court is to appoint commissioners to fill vacancies but the owners of a majority in assessed value may petition for the appointment of a particular person or persons and the court is obligated to appoint the person so designated. (Ark. Code Ann. § 14-117-301(c)) Assessment of benefits and tax levies are essentially identical to the procedure for improvement project areas within water distribution districts. (Ark. Code Ann. § 14-117-403 to 413)

GENERAL POWERS OF DISTRICTS RELATED TO CONTRACTING

Under the Regional Water Distribution Act, districts are permitted to make "any and all" contracts for the exercise of authorized functions (Ark. Code Ann. § 14-116-402(12)). The Act contemplates that water districts may generate revenue from "rates, fees, rents, or other charges" for water and for "facilities, supplies, equipment, or services" furnished by the Water district. (Ark. Code Ann. § 14-116-402(13)) This method of revenue generation was the only means authorized prior to the amendments to the Act in 1995 and the authorization for the creation of Improvement Project Areas within water districts. The establishment of an Improvement Project Area allows for assessment of land within the project area on the basis of benefits accruing to the land from the improvement plan. (Ark. Code Ann. § 14-116-601). A tax is levied against each parcel of

land within the project area and this tax is to be sufficient to pay "up to the estimated cost of the improvement, all related costs, including but not limited to interest, bond issuance, legal, accounting, appraisals, the debt issuance and related costs, and up to an additional twenty percent (20%) for unforeseen contingencies." (Ark. Code Ann. § 14-116-601(b)(1)) In addition, a tax may be levied to pay preliminary expenses for the development of the project plan if construction will not proceed immediately on the works of improvement. (Ark. Code Ann. § 14-116-609) Furthermore, an annual tax levy as either a flat charge per acre or a charge in proportion to the amount of the assessment of benefits is to be made for operation and maintenance of the works of improvement. The taxes so levied are collected by the county collector and paid over to the district less the collector's commission. (Ark. Code Ann. § 14-116-611)

Taxes levied may be paid in installments of no more than ten percent (10%) per year with interest on deferred installments or, at the landowner's option, paid in full without interest, within 30 days after the levy becomes final. (Ark. Code Ann. § 14-116-607) The tax levied is a lien upon the land which continues until all taxes are paid. (Ark. Code Ann. § 14-116-608)

The addition of the Improvement Project Area authority contemplates that the costs of construction, operation and maintenance of water distribution facilities and all related costs will be paid through the tax levy. The original authority of water district contemplates that charges for water and for

services furnished by the district could be collected as "rates, fees, rents or other charges." The original legislation allowed charges for facilities, supplies, and equipment, as well, but these would now appear to be covered by the tax levy for land within an Improvement Project Area although it would seem that the district could still charge for any such facilities, supplies and equipment furnished an individual that are not part of the overall "works of improvement" in the project plan. In other words, any facilities specific to an individual producer could be charged to that individual in addition to overall tax levy for project works of improvement.

For example, if the overall improvement plan includes canals or distribution facilities, the cost of these would be recovered as part of the tax levy. Cost of individual water supply facilities furnished to individual users could be recovered by rates and fees under this more general authority.

The contract to supply water for individual producers would recognize the assessed benefits already covered by taxes levied against the individual land for the "works of improvement" and the annual levy for operation and maintenance of those works of improvement. The main focus of the contract would, then, be on any charges ("rates, fees, rents or other charges") for any individual facilities furnished and for the delivery of the water itself.

Under the general district powers the District has explicit authority to assist customers in the preparation of their

premises for the use of water. (Ark. Code Ann. § 14-116-402(4)) This provision expressly allows the district to "receive, acquire, endorse, pledge, hypothecate, and dispose of notes, bonds, and other evidence of indebtedness." If the district installs water facilities on individual premises of water users, there is considerable flexibility in the arrangement under which the user may pay the district for costs of these facilities under these provisions.

Given these options for financing a decision will have to be made as to whether the tax to be levied based on the assessment of benefits is to be sufficient to cover all costs associated with the "works of improvement" as contemplated by the Improvement Project Area legislation. Likewise, a critical decision will be the extent to which operating and maintenance costs will be covered by an annual tax levy or will be included as part of the contract between the District and the operator.

As to the cost of the improvements, the legislation specifically allows discretion on the part of the district "taking into account available funding sources" to have the total tax levied to be sufficient to pay "up to the estimated cost of the improvement, all related costs," plus up to an additional twenty percent (20%) for "unforeseen contingencies." (Ark. Code Ann. § 14-16-601(1) It is important to note that the District may, but is not required, to recover all project costs in this fashion.

The assessment of benefits to land within the project area

is based on benefits accruing to the land from the improvement plan. There is considerable latitude in the exact method to be used in apportioning assessments according to benefits received. (Some states authorize ad valorem taxation based upon property values; others use uniform rates per acre; but, "assessment on the basis of benefits" ... allows "greater flexibility and equity in levying assessments." Benson, "Desert Survival: The Evolving Western Irrigation District", 1982 Ariz. St. L.J. 377, 392-93) Where improvement districts (Improvement Project Areas) are used the assessment is based on the benefits provided — not according to the value of the lands irrigated.

Obviously, all lands within the Improvement Project Area will benefit by having water potentially available although not all will need access immediately. For these reasons, the assessment of benefits will vary depending on the immediacy of the need for access to water from the District. The assessment may be viewed as partially for immediate benefits and partially for future benefits. The statute authorizes reassessment when the District board determines that the current assessment on any land within the improvement project area has become inequitable. (Ark. Code Ann. § 14-116-606) For example, if a particular parcel currently does not need access to water but in the future requires it, a reassessment of benefits may be made and, of course, the tax levy changed to reflect the increased benefits. Thus, a basic level of benefit could be assessed to all land within the improvement project areas carrying with it a tax levy

that could be seen as a charge for future availability of water. Those lands needing water immediately would accrue greater benefits and the tax levy would be higher because of the greater immediate benefits.

SPECIFIC QUESTIONS

1. How does the District assure payment for water? crop liens? liens on land? contract only?

To the extent that a district creates Improvement Project Areas and uses the assessment of benefits approach to determine an appropriate tax levy for costs of works of improvement or for annual operating and maintenance expenses, the taxes so levied is considered a "charge against the land" and is a lien on the land from the time the tax is levied by the court. This lien is entitled to a preference over all other liens and encumbrances and continues until the tax is paid (Ark. Code Ann. § 14-16-608)

The landowner may pay the tax in full, without interest, within 30 days, or the tax may be paid in installments of not more than 10% per year. Any deferred installments bear interest at a rate to be established by the District board. (Ark. Code Ann. § 14-116-607)

To the extent that the District enters into contractual agreements with landowners for the delivery of water, the District is empowered to make "any and all" contracts "necessary and convenient" for carrying out its functions. (Ark. Code Ann.

§ 14-116-402(12)). Various options then exist by which the contract may assure payment.

Water use deposit. A number of districts in Western states require an advance deposit each year based on the projected or estimated water usage for the particular user. This deposit accrues interest while in the hands of the district. The deposit may be adjusted from time to time to reflect actual monthly usage and the charges for actual use are deducted unless separate monthly payments are made for water actually used. Any unpaid water use amounts are deducted at the end of the water year before refunding the deposit plus interest.

Payment Guarantee or Irrevocable Letter of Credit. Some districts require a payment guarantee from the user's crop finances or an irrevocable letter of credit from a lending institution to cover a specified amount of estimated water usage -- perhaps three or four months equivalent.

Withholding Water. A typical provision in many water supply contracts allows the District to withhold delivery of water if water charges are not paid as due (usually monthly).

Liens on Land. In a number of western states districts may file a certificate with the county assessor reflecting unpaid water charges as a lien on the land. This is specifically authorized by statute. However, in absence of such a statute, the contract could allow the creation of a lien by consent of the landowner. In Arkansas the creation of a lien would have to be accomplished by inclusion of language within the contract. To be

effective against third parties a more formal arrangement would be necessary so that it could be recorded as a mortgage. (See, e.g., Ward v. Stark, 91 Ark. 268, 121 S.W.2d 382 (1909).)

Liens on Crops. In order for water charges to constitute a lien on crops, the District and operator would have to enter a security agreement granting the District a security interest in the crops under the provisions of the Uniform Commercial Code (UCC). This would include not only an agreement similar to that with any lender providing crop financing but also the filing of a UCC Financing Statement reflecting the District's claim to an interest in the crops to be produced on the land. This filing is crucial to establish the relative priority of the District for payment as against other secured parties such as the lender who provides crop financing.

2. Does the contract with the farmer, including the payment agreement concerning water, provide sufficient security to accomplish financing goals?

The portions of the project cost that are to be recovered by tax levies as well as the portions of the annual operating and maintenance expenses that are recoverable using the assessment/tax levy authority are the most secure in that unpaid taxes become a lien upon the land. The level of security provided by the contractual agreement depends on the options selected for assuring payment for water. A basic contractual

agreement with no specified method of securing payment offers the least protection to a district. If liens on either land or crops are used a greater level of security is provided. Advance deposits or irrevocable letters of credit or lender payment guarantees offer the highest level of protection.

3. Does the contract for furnishing water run with the land or is it individual to the farmer? Can it be transferred? If minimum purchase requirements are included, can water be then transferred to others? To nonmembers or those outside the District? How can this be prevented?

The improvement project area option contemplates that particular parcels of land with the project area will benefit from the project. It is on this basis that assessment of benefits and the resulting tax levies occur. This portion of cost recovery can only be related to the land and is specific to industrial parcels of land. (The owner could, of course, in lease agreements provide for payment by a tenant.) If title to the land is transferred the tax levy, of course, continues and is a responsibility of the new owner.

While there is nothing to prevent a district from entering contracts for the supplying of water to customers as individuals, even those outside the district, it is not consistent with the use of the improvement project area approach to do so unless those persons bear full costs, including a share of the costs of

the works of improvement and the operating and maintenance costs in the same way as landowners within the project area must through the assessment of benefits/tax levy. And, the 1997 legislation includes a method by which such additional lands could be added to the project area upon full payment. However, it is unlikely that the district would wish to use this procedure in the immediate future and certainly not for individual owners.

It, then, seems consistent with the improvement project area concept to limit contracts to supply water to those who are landowners within such areas and to tie the water supply contract to particular parcels of land in the same way that the assessment of benefits and tax levies relate to the land.

In order to assure that water use is to be on specific land within the district and within the improvement project area, the contract may require an annual Application for Water. This application could specify (1) the crops, and the corresponding acreage of each crop, which the applicant intends to irrigate, (2) the name of the owner of the land, (3) the name of tenant or tenants, (4) the location of acreage for which water is requested.

The contract to supply water could, then, restrict the use of water on lands other than those identified in the application. The contract could provide that any transfer of the land also would require a new (or modified) application.

An alternative approach would be to enter into longer term water supply contracts, perhaps ten years or more, with specific

parcels identified to receive water. Such contracts could be made binding on the current landowner, any tenants or subsequent purchasers of the land.

4. Who is obligated to sign any contracts to furnish water -- the landlord or the tenant? Who is responsible for the assessment, the annual fee, if any, and for paying the cost of water delivery? Should the district require both the landlord and tenant to agree?

The costs to be recovered by the assessment/tax levy approach clearly are charges against the land and the basic responsibility for these taxes is that of the landowner. Nothing would prevent the landowner and tenant from agreeing in their lease that the tenant would bear the responsibility.

The charges associated with water delivery to particular parcels, if secured by liens on the land, naturally become a similar responsibility of the landowner. If the payment is to be secured by other means, this could as easily become a responsibility of the tenant. However, from the district's perspective the greatest protection would be to require agreement (and assumption of responsibility for payment) by both landlord and tenant.

5. Can the payment for water be delayed until harvest and, if so, may interest be charged on the value of water used

without an up front payment?

Since the district may choose the method of assuring payment it may allow deferred payment plans, with or without interest. However, unless the assurance of payment is in the form of a payment guarantee from a lender, an irrevocable letter of credit, a crop lien or lien on the land, the district's ability to collect delinquent payments may be limited to usual methods of debt collection. Service may, of course, be withheld.

6. What provisions should be included in a "model" water supply contract.

It would be useful for the district to develop some general "policies for distribution of water" to be approved by the board and made available to all district landowners and, particularly, those within an improvement project area. The provisions of an individual water supply contract would incorporate the relevant policies and add any specific provisions applicable to the individual cases. Attached are proposed policies for use in development of a contract.

PROPOSED POLICIES FOR WATER DISTRIBUTION

WHITE RIVER REGIONAL IRRIGATION WATER DISTRIBUTION DISTRICT

These policies are adopted by the Board of the White River Regional Irrigation Water Distribution District (WRRIWDD) to provide guidance to landowners within the District as to how the District will govern the distribution of water. These policies are based on the authority of the District to "regulate, define and control the rate and location of the withdrawal or transfer of water owned, acquired or developed by the District" and to "fix, regulate, and collect rates, fees, rents, or other charges for water" and for service furnished by the District in accordance with Arkansas Code Ann. § 14-116-402(3)(E) and (13)(A). It is anticipated that each irrigator who desires water from the District will enter into a Water Supply Contract with the District which will incorporate the basic policies outlined herein as a part of the agreement.

Section 1. General Operating Policies

[To be added by the Board]

Comment: The Board may wish to adopt general policies for operation of projects such as delegation of management authority, an appeals process, or other policies relevant to day-to-day

operation. These could be included at this point if directly related to water distribution.

Section 2. Project Improvement Plan/Assessment

Upon approval of the court of the District's improvement plan for an improvement project area within the District known as WRRIWDD Improvement Project Plan No. 1 the assessor retained by the district will assess the land within the project area on the basis of benefits accruing to the land from the improvement plan.

Comment: The addition in 1995 of authority for improvement plan assessments and the levy of tax based on the assessment of benefits to land within an improvement project area, provides a basic financing tool for carrying out the project. Once the court determines that the improvement plan is in the best interest of the owners of land within the project area the court may authorize the District to employ an assessor. The assessor's first duty is to determine that at least a majority of the owners of the benefited lands and the owners of a majority in value of the benefited lands, as shown on the latest county assessment, have signed the petition for establishment of the improvement project area. Based on the assessor's certification the court shall then enter an order approving the improvement plan and establishing the project improvement area. (Ark. Code Ann § 14-116-502(c))

Once this approval is obtained, the assessor is to assess

the land within the project area on the basis of benefits accruing to the land from the improvement plan. Each tract of land is to be separately identified, described and the value of benefits by reason of the improvement plan noted along with an estimate of what the landowner will be required to pay on the assessment. (Ark. Code Ann. § 14-116-601(a),(d).)

Section 3. Tax Levy for Costs of Improvements

The total tax levied against all individual and separate parcels of land within the project area shall be determined by the Board (and approved by the court) in an amount sufficient to pay up to _____ percent (_____%) of all estimated costs of the improvement, all related costs, and up to twenty percent (20%) for unforseen contingencies.

Comment: The District is given the discretion to determine the total tax to be levied against land in the project area taking into account available funding sources. This total tax may be in an amount sufficient to pay the estimated cost of the improvement, all related costs such as interest, bond issuance, legal, accounting, appraisal, debt issuance and related costs, and up to an additional 20% for unforeseen contingencies.)Ark. Code Ann. § 14-116-601(b)) This levy is to be approved by the court. (Ark. Code Ann. § 14-116-608(a).)

Thus, the Board must decide how much of the total cost of the improvement project is to be recovered through the tax levy and how much from other sources, such as payments for water used

and water delivery services provided.

Section 4. Payment of Tax Levy/Lien

The tax levied against the land will be a charge against the land in proportion to the amount of the assessment of benefits and may be paid in full, without interest, within thirty (30) days after the levy becomes final. Alternatively the landowners may pay the tax levy in installments of ten percent (10%) of the allocated tax per year. Any such deferred installments shall bear interest at a rate of _____ percent (_____%) per annum payable with each installment. The tax levied is a lien upon the land which continues until the tax is fully paid.

Comment: The legislation authorizing assessment-based water district projects allows the landowners the option of paying the tax in full, without interest, within 30 days after the levy becomes final or electing to pay in installments so that no more than 10% of the allocated tax is collectible in any one year. The deferred installments bear interest at a rate to be established by the Board. (Ark. Code Ann. § 14-116-607.)

Section 5. Reassessments

Because not all parcels of land within the improvement project area will be able to take water from the District initially, the initial assessment of benefits may be less for some parcels. As water becomes available to such parcels in the

future, a reassessment of benefits will be made to accurately reflect the greater benefits to be received.

Comment: Reassessment of any land within the improvement project area may be directed by the Board if there is a change in the improvement plan, a change in land use, or if for any other reason the current assessment has become inequitable. (Ark. Code Ann. § 14-116-606(b).) It is contemplated that the initial assessment will reflect benefits to all land within the project area due to the potential availability of water for irrigation purposes. However, the assessor may determine that those lands which will be able to take water from the District initially will be benefited to a greater extent and, thus, carry a higher initial assessment of benefits. If this is the case, as water availability is extended to additional areas under the improvement plan, reassessment of those parcels gaining access to District water will become necessary.

Section 6. Annual Levy of Tax for Operation and Maintenance

In addition to the tax levy for payment of the costs of improvement, the Board will on or before the first Monday in October of each year estimate an amount necessary in the ensuing calendar year for operation and maintenance. Upon court approval a levy shall be made against all benefited land within the improvement project area for which water is available from the District sufficient to pay all or part of these estimated costs

in proportion to the amount of the assessment of benefits in the land.

Comment: Expenses of operating and maintenance may be recovered, in part, from the payments received for water and water delivery services. However, the legislation allows the Board to make a separate tax levy each year, taking into account all available funding, for an amount to pay operating and maintenance of the works of improvement. This is, by statute, permitted to be a flat charge per acre or a charge against the benefited land in proportion to the amount of the assessment of benefits. (Ark. Code Ann. § 14-116-610.) The Board may choose the method, but it is anticipated that the charge based on assessment of benefits will achieve the more equitable result, especially if the assessor makes a distinction between land with immediate access to District water and that which will receive access at some future point. If this is done those with immediate access will pay a greater proportional share of the operating and maintenance costs annually.

Section 7. Applications for Contract Water Service

For those water users who wish to obtain delivery of water from the District, an Application for a Water Supply Contract must be filed with the District. The application will identify the landowner, the parcels of land to be irrigated, and the total estimated water requirement for a Water Year. If the land is to

be operated by a tenant both the landowner and tenant must sign the application.

Water users may not divert, intercept, impound, or otherwise use District water on any lands within the District, without filing an application for such water and executing an express written agreement (Water Supply Contract) with the District for the use of such water. This prohibition applies irrespective of whether the water is diverted from a conduit or lateral, or taken from or impounded in a natural channel or drain.

Comment: The intent of this section is to make sure that water supplied by the District is available only to those who properly apply for and execute a contract for the supply of water. The application process aids the District in being able to identify lands to be irrigated with district water and asserts in overall planning by providing some estimates of annual water demand.

Section 8. Long Term Water Supply Contract

A Water Supply Contract will be signed by the applicant (both landowner and tenant) providing for payment for water and services furnished by the District prior to being eligible to receive water from the District. The Water Supply Contract will provide for the supply of water for a term not exceeding ____ years. The Water Supply Contract will be in a form approved by the Board and will be recordable. [It may contain language providing that the obligations for payments create a lien against

the described property.] Additionally, evidence of payment of all due taxes and assessments must be provided to the District prior to delivery of water to the water user unless the Board has waived this requirement.

Comment: The use of the long term Water Supply Contract is suggested as a means of better forecasting the revenues for the District over a period when obligations for payment for works of improvement will be significant. This contract should incorporate the policies set out in this document as well as any additional provisions appropriate to an individual situation. Because assurance of payment of charges for water is a matter of concern, it may be advisable to develop a form contract that is not only recordable but one which allows for the creation of a consensual lien against the land itself for securing of payments. Since this is a matter for the Board's ultimate decision it is offered as an optional provision. If the contract is to be recordable, the legal description of the parcels involved will have to be included. Furthermore, specific language would have to be included by which the landowner consents to the creation of a lien against the land, in effect creating a mortgage document. This option may not be necessary if the payment guarantees in Section 10 are considered sufficient to assure payment.

Section 9. Charges for Water and Services Furnished

A. **Water Delivery Charges** - These charges will be based on

the actual amount of water delivered calculated on a per acre-foot basis. The contract will reflect the amount of this charge.

B. **Stand By Charge** - A stand by charge based on acres of irrigated land, as reflected in the application, will be required to provide for the delivery of water. This annual charge will be necessary to ensure the availability of and access to water regardless of the amount of water actually used in any Water Year.

C. **Service Charges** - To the extent that the District furnishes other services to the landowner in the preparation of the landowner's property for the delivery of water furnished by the District, the contract shall provide for the payment of any such charges.

Comment: The contract will have to set out some detail regarding the calculation of charges for water, presumably based on actual deliveries and on a per acre-foot basis. In addition, this policy calls for an annual Stand By Charge on a per acre basis to assist in the deferral of annual operating cost. Since the annual operating and maintenance costs of facilities may be covered by the annual tax levy, this charge would pay some portion of administration and general operating costs.

Furthermore, the statute setting and the authority of the District allows the District to provide other services to landowners and provides that these costs may be recovered by the District from customers. This provision allows for the District

to enter such agreements, if necessary, to carry out the improvement plan. (Ark. Code Ann § 14-116-402(4),(13)(A).)

Section 10. Assuring for Payment of Charges for Water and Services

A. **Estimates of Water Usage.** Under the Application described in Section 7., a water user shall provide the District with an estimate of the amount of water which water user intends to order from the District in each succeeding Water Year. Based on these estimates, and on the District's records showing past water uses by the water user, the District will determine the Average Monthly Water Usage ("AMWU") for the water user in the upcoming Water Year.

B. **Payment Guarantee, Irrevocable Letter of Credit [or Cash Deposit].** The water user shall also be required to submit to the District a payment guarantee, in a form approved by the District, from water user's lender who provides crop financing in an unlimited amount or an irrevocable letter of credit, in a form approved by the District from a credible lending institution authorized to do business in the State and sufficient in amount to cover _____ AMWU's of water during the Water Year.

[In lieu of payment guarantee or an irrevocable letter of credit, a water user shall provide the District with a cash deposit in an amount to cover _____ AMWU's, which deposit will accrue interest at a rate of ten per cent (10%) per annum, which interest will be paid to water user at the end of the Water

Year.]

Unless these forms of payment guarantee have been furnished by the landowner, a tenant applying for water delivery will be required to submit the required payment guarantees.

C. **Water Billing.** The District will bill the water user for the actual usage of water by the _____ of the month following the month in which the water was used and the water user will be required to pay the District by the _____ of the month following the water usage. Accounts which are not paid by the _____ will be assessed interest at the rate of _____. The District may refuse to make future water deliveries to the water user if the water user has any outstanding delinquent payment obligations for prior water usage.

Comment: Payment guarantees are deemed to be a necessary provision in the Water Supply Contract. Of course, the consensual lien discussed in Section 8, may be one means of providing security for payment. A more feasible option may be to use other means of payment guarantee, especially the Letter of Credit. This would be of particular consequence if tenants change so a requirement is added requiring the tenant to submit a payment guarantee, if not previously supplied by the landowner.

An optional method of a cash deposit is set out for the Board's consideration. This technique is used by some Water Districts in the west where water is supplied on a continuous basis.

The billing procedure may be somewhat flexible depending on whether the District wishes to require monthly payments for water usage. An alternative, end of water year billing procedure could be adopted instead of monthly billing.

Section 11. Sale of Land/Change in a Lease

Upon the sale of land, change in a lease or other operating arrangement, the landowner and/or tenant must notify the District and file an amended Application for Water. Landowners not notifying the District of a change in status will be responsible for any charges incurred until such written notification is given.

A landowner selling any part of his land served by the District shall reach an agreement with the purchaser regarding water provided by the District and the use of facilities employed to deliver water provided by the District. The District will be under no obligation to deliver water to such lands until the Water Supply Contract is assumed by the new landowner or tenant, as the case may be. Such Assumption Agreements shall be on forms provided by the District, executed and completed in a manner satisfactory to the District. As provided in section 10, payment guarantees will be required of any new landowner and of any new tenant unless previously provided by the landowner.

Comment: By including a provision of this nature in the Water Supply Contract the District is assured of being informed of any

changes resulting from a sale or a change in tenants. The responsibility rests on the landowner for payment of all water charges until the new owner or tenant assumes the responsibility for payment and provides the payment guarantees required for security of payment.

Section 12. Connections/Farm Turnouts

All water deliveries will be made only through District owned and operated turnouts equipped with District metering facilities. No gate, takeout, siphon or other structures or device shall be installed or placed in any canal, ditch or conduit belonging to or operated by the District except in the pursuance of plans or orders made by the Board of Directors, nor shall any person divert or take water from any canal, ditch or conduit belonging to the District or under its control, or make any opening therein, or change, molest, disturb or interfere with any gate, takeout or other structure or device in any such canal, ditch or conduit without permission of the District.

All connections to the District facilities shall be made in a manner so as to prevent damage from occurring to or interference with the operation of the District facilities resulting from operation of an irrigator's system and so as to prevent water from such systems from entering the District's system. Plans for the connection of a water user's system to the District's facilities shall be submitted to the District for approval and no such connection will be permitted until such

approval has been given.

Comment: The intent of this section is to assure the District is informed of water used by irrigators and to protect District facilities from damage from unauthorized connections.

Section 13. Waste of Water

In order to assure a dependable supply of water to all users within the Water District, irrigators are encouraged to avoid waste of water. The Water District, along with the Arkansas Soil and Water Conservation Service, will assist the irrigator in the development of appropriate water conservation plans and will encourage each water user to implement the provisions of such plans.

Comment: It is the intent of the District not to interfere with the use of water by an irrigator on their own property. However, it is in the best interest of the District and all water users to avoid waste of water and, toward this goal, the District will assist, as requested, in the development of water conservation plans.

Section 14. Right to Recapture Waste, Seepage and Return Flow

Without obligation of the District to assume any responsibility therefor, the District shall have the right to recapture and use for District purposes all runoff, seepage, and

return flow water, if any, which escapes or is discharged from water users' lands to facilities owned or operated by the District.

Comment: Once water used by an irrigator re-enters District facilities through runoff, seepage, or return flow, the District may treat that water as District water. The water user is not prohibited from capturing and reusing such water while it is still on the property of the irrigator.

Section 15. Character and Quality of Water

The character and quality of District Water furnished hereunder may vary from time to time, and the District does not covenant or warrant in any respect the character or quality of the water delivered pursuant to Water Supply Contracts. Said water is not suitable for human consumption without treatment nor for livestock consumption. Most of the water furnished by the District is pumped, flows through many miles of open ditches, and is subject to pollution, shortages, fluctuation in flow, and interruption in service. District employees shall not and are not authorized to make any agreements binding the District to serve a certain quality of water. All water furnished by the district will be on the basis of deliveries for agricultural purposes; consumers putting District water to other uses do so at their own risk, and assume all liability for, and agree to hold the District and its directors, officers, agents and employees

free and harmless from, liability and damages that may occur as a result of defective water quality.

Comment: This provision sets out in some detail the District's position that water provided cannot be of a guaranteed quality. This contractual provision is in large part informational so that users of water will know, in advance, that the District cannot assume responsibility for defective water quality.

Section 16. Agricultural Purposes

District Water shall be used by water users for agricultural purposes only unless special purpose water deliveries have been authorized by the Board. "Agricultural purposes" shall mean the application of water used primarily in the commercial production of agricultural crops or for use in fish production and aquaculture. "Agricultural purposes" does not include the use of water for livestock consumption.

Comment: This section relates to the prior section on water quality but is included to re-emphasize that the purpose of water delivery by the District is for agricultural use only.

Section 17. Water Shortage

The amount of water available for distribution by the District will depend on the terms of its permit from the Arkansas Soil and Water Conservation District and is subject to reduction

during shortages if an allocation is made by the Commission or by any agency to which the Commission delegates allocation authority. The District provides water as a commodity only and not as a guaranteed service. The District will not be liable for shortage of water, either temporary or permanent, or for failure to deliver water.

When through lack of water, lack of canal capacity or for any other reason it is not possible for the District to deliver any portion thereof the full supply of water required by the water users, such supply as can be delivered will be equitably prorated until such time as a delivery of a full supply can be made. In no event shall any liability accrue against the District or any of its officers, agents, or employees for any damage, direct or indirect, arising from temporary discontinuance or reduction of water deliveries or from a shortage on account of problems in deliveries, drought, allocation by the Commission or any other cause whatsoever.

Comment: The District will acquire water under permit from the Arkansas Soil and Water Conservation Commission. The permit may include conditions which could result in reductions in the amount of water available to the District under some situations. For example, if a drought occurs and water shortages are evident, the Commission might, under its allocation authority, order reductions by all users of water, including the District. While unlikely, this contingency is provided for in this section.

Likewise, the District cannot be in a position of assuming liability for a guaranteed level of delivery. This section, again in part informational, makes it clear in advance that the District is not to be liable for shortages or failures in delivery.

Section 18. Non-Liability of District

In connection with all water service provided pursuant to these policies the District will not be responsible for the control, carriage, handling, use, disposal, or distribution of water delivered to water users outside the facilities operated and maintained by District.

The District will not be liable for any damage of any kind or nature resulting directly or indirectly from any private ditch or pipeline or the water flowing therein or for negligent, wasteful or other use or handling of water by the users thereof. The District's responsibility shall absolutely cease when the water leaves the canal or a pipeline of the District. The water user, and not the District, is responsible for installing protective devices to protect his private pump or other facilities from damage due to high water pressure and low water pressure which may occur from time to time in the District's water system.

Each property owner shall be responsible to the District for all damage to District property caused by his own negligent or careless acts or the negligent or careless acts of any agent,

tenant, employee of the property owner.

Comment: Just as the policy that the District will not interfere with an irrigator's use and control of water while on the user's property, the District can assume no responsibility for use or handling of the water once it leaves District facilities. This section not only emphasizes that point but suggests that water users protect their own systems with protective devices and informs users of their potential liability for damage to District facilities by negligent or careless acts.

Section 19. Prohibition of Use of District Water Facilities for Recreational Purposes

The District's facilities for water delivery are to be used solely for the purpose of conveying water for use for agricultural purposes. The use of District facilities for recreation is prohibited.

Landowners and other water users are urged to prevent the use of District facilities for recreation such as swimming, boating or fishing or similar unauthorized uses.

Comment: Because the District will not be able to patrol nor be aware of activities on District facilities such as canals or natural streams used for conveyance of water, this section seeks the assistance of landowners and other water users in trying to prevent use of facilities for recreational purposes.

Section 20. Right of Access

Pursuant to Ark. Code Ann. § 14-116-402(18) and these policies, District employees authorized by the Manager shall have reasonable access to lands and project facilities within the District for the purpose of conducting the District's business which may include, among other matters, the following:

(a) Distribution and use of water on lands included within the District.

(b) Inspection, maintenance, repair or modification of the project facilities.

(c) Inspection of conditions and/or non-District facilities which are causing, or may cause, damage to the project facilities or to the safe and effective operation thereof.

At all times District employees shall have reasonable rights of ingress and egress across all lands within the District for the purpose of utilizing the rights-of-way and easements pertaining to the project facilities.

Comment: This section comes directly from the legislation setting out the powers of water districts. To effectively manage water distribution, reasonable access to facilities throughout the project area will be necessary.

Section 21. Use of Other Water Supplies by Riparians

A water user who is a riparian landowner may use water

furnished by the District concurrently with water from natural water courses based on the riparian owner's historical riparian use from such natural water courses. However, the Water Supply Contract will specify an average annual amount of water identified as the historical riparian use. Any amounts above this use shall be charged to the user in accordance with Sections 9 and 10. Furthermore, should the Arkansas Soil and Water Conservation Commission or any agency to which such authority is delegated establish an allocation amount to such user which is less than the average historical riparian use, the charges to the user shall be adjusted accordingly. That portion of water charges designated as the Stand By Charge in Section 9 shall be payable by such users in any event.

Comment: The legislation setting forth district powers specifically allows water districts to "regulate, define, and control" withdrawals or transfer of water "owned, acquired, or developed" by a water district even if located in natural water courses. Since some users of District water may be riparian landowners along natural water courses, the legislation provides that such riparian owners are not obligated to pay for their "historical riparian use" from such water courses. (Ark. Code Ann. § 14-116-402(E)) This provision recognizes that some riparians may also wish to use District water located in these same water courses concurrently with the historical use. To effectively manage this situation, the Water Supply Contract will

have to include information on the historical use. This level of use is subject to adjustment in allocation procedures of the Arkansas Soil and Water Conservation Commission and the contract will allow for similar adjustment of water charges for District water.

Section 22. Ownership of Water

All water acquired or purchased by the District is the property of the district and is subject to regulation and control by the District. No landowner acquires any proprietary right in the surface water by reason of such use, nor does such landowner acquire any right to resell the water purchased or used, or the right to use it on premises or for a purpose other than for which it was applied and as stated in the application except with the express written approval of the District.

Comment: The legislation setting forth district powers specifically recognizes that water districts may acquire absolute title to save water and have the right to control all water acquired, owned or developed by the District. This section is designed to emphasize that District water is to be used under the terms of the Water Supply Contract and cannot be re-sold to other users nor used for purposes or at locations not authorized in the contract. This is necessary to assure District controls, and revenue from, water provided.